Supreme Court, U.S.
FILED
DEC 12 2003
OFFICE OF THE CLERK

No. 02-1609

In The Supreme Court of the United States

THE CITY OF LITTLETON,

Petitioner,

v.

ZJ GIFTS D-4, L.L.C., a Colorado Limited Liability Company d/b/a CHRISTAL'S,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF PETITIONER

J. ANDREW NATHAN
Counsel of Record
HEIDI J. HUGDAHL
NATHAN, BREMER, DUMM & MYERS P.C.
3900 E. Mexico, Suite 1000
Denver, CO 80210
(303) 691-3737

LARRY W. BERKOWITZ
City Attorney
BRAD D. BAILEY
Assistant City Attorney
City of Littleton, Colorado
2255 West Berry Avenue
Littleton, CO 80165
(303) 795-3725

SCOTT D. BERGTHOLD
LAW OFFICE OF SCOTT D. BERGTHOLD, P.L.L.C.
6830 McCutcheon Rd.
Chattanooga, TN 37421
(423) 899-3025

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the requirement of prompt judicial review imposed by *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990) entails a prompt judicial determination or a prompt commencement of judicial proceedings.

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement	4
The Ordinance's Background and Purpose	4
Littleton's Adult Entertainment Establishment Ordinance	5
The District Court and Tenth Circuit Proceedings	9
Summary of Argument	13
Argument	18
I. Under *FW/PBS*, Littleton's Ordinance Satisfies the First Amendment Because It Provides for Prompt Commencement of Judicial Review	18
A. The Rationales of *Freedman's* Prompt Judicial Decision Requirement Are Inapposite to Littleton's Ordinance	22
B. ZJ's "Substantial or Significant" Argument is Not an Unbridled Discretion Argument At All, But a Meritless Vagueness Challenge Irrelevant to the Question Presented	26
C. ZJ's "Content-Based" Argument is Not Only Irrelevant to Prior Restraint Analysis, But Also Directly Contrary to this Court's Adult Business Cases	29

TABLE OF CONTENTS – Continued

	Page
D. The Littleton Ordinance Contains Narrow, Objective Standards that Guide the Licensing Decision and Render it Subject to Effective Judicial Review	33
II. Accepting ZJ's Argument Would Cause Substantial, Unwarranted Harm to Municipal and Judicial Interests	36
Conclusion	42

TABLE OF AUTHORITIES

Page

FEDERAL CASES

4805 Convoy, Inc. v. City of San Diego, 183 F.3d 1108 (9th Cir. 1999).....40

Baby Tam and Co., Inc. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998).....37

Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).....30, 33

Boos v. Barry, 485 U.S. 312 (1988).....32

Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999).....39

California v. LaRue, 409 U.S. 109 (1972).....40

Center for Fair Public Policy v. Maricopa County, 336 F.3d 1153 (9th Cir. 2003).....31

City News & Novelty, Inc. v. City of Waukesha, 531 U.S. 278 (2001).....20, 40

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) .....*passim*

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988).....18

City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002).....4, 30, 32, 40

City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).....*passim*

Cox v. New Hampshire, 312 U.S. 569 (1941).....31

Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 404 U.S. 412 (1972) 2

DLS, Inc. v. City of Chattanooga, 107 F.3d 403 (6th Cir. 1997).....31

TABLE OF AUTHORITIES – Continued

Page

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).....32

FCC v. Pacifica Foundation, 438 U.S. 726 (1978).....39

Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992).....34

Freedman v. Maryland, 380 U.S. 51 (1965) .....*passim*

Fusari v. Steinberg, 419 U.S. 379 (1975)..... 3

FW/PBS, Inc. v. Dallas, 493 U.S. 215 (1990) .....*passim*

Graff v. City of Chicago, 9 F.3d 1309 (7th Cir. 1993).....18, 26, 41

Hall v. Beals, 396 U.S. 45 (1969)..... 2

Jews for Jesus, Inc. v. Massachusetts Bay Transp. Authority, 984 F.2d 1319 (1st Cir. 1993).....17, 41

Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).....25

Meyer v. Grant, 486 U.S. 414 (1988).....39

NCAA v. Smith, 525 U.S. 459 (1999).....27

Near v. Minnesota, 283 U.S. 697 (1931) 25

Niemotko v. Maryland, 340 U.S. 268 (1951).....19

Nightclubs, Inc. v. City of Paducah, 202 F.3d 884 (6th Cir. 2000) 37, 40

Patsy v. Board of Regents, 457 U.S. 496 (1982).....29

Poulos v. New Hampshire, 345 U.S. 395 (1953).....31

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 25

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).....32

Schlesinger v. Councilman, 420 U.S. 738 (1975).....38

TABLE OF AUTHORITIES – Continued

Page

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 15, 22, 28, 30

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 14, 19, 20, 22

Speiser v. Randall, 357 U.S. 513 (1958) 23

Spokane Arcade, Inc. v. City of Spokane, 75 F.3d 663 (9th Cir. 1996) 31

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 15, 27

Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968) 19

Thomas v. Chicago Park District, 534 U.S. 316 (2002) ..... *passim*

TK's Video, Inc. v. Denton County, 24 F.3d 705 (5th Cir. 1994) 26

U.S. v. Chemical Foundation, Inc., 272 U.S. 1 (1926) 36

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 15, 31

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 29

Withrow v. Larkin, 421 U.S. 35 (1975) 36

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) ..... *passim*

STATE CASES

Allen v. Butterworth, 756 So.2d 52 (Fla. 2000) 37

City of Colorado Springs v. 2354 Inc., 896 P.2d 272 (Colo. 1995) 14, 16, 21, 36

TABLE OF AUTHORITIES – Continued

Page

Coate v. Omholt, 662 P.2d 591 (Mont. 1983) 37

In the Interest of J.E.S., 817 P.2d 508 (Colo. 1991) 16, 37

Mai Lee Le v. City of Citrus Heights, 1999 U.S. Dist. Lexis 13477 (E.D. Cal. 1999) 37

Tri-State Generation and Transmission Co. v. City of Thornton, 647 P.2d 670 (Colo. 1982) 8

STATUTES AND COURT RULES

28 U.S.C. § 1254 1

42 U.S.C. § 1983 ..... 2, 9, 29

Fed.R.Civ.P. 11 11

Colo.R.Civ.P. 65 7

Colo.R.Civ.P. 106 ..... 12, 38

Colo.R.Civ.P. 106(a)(2) 7

Colo.R.Civ.P. 106(a)(4) ..... *passim*

Colo.R.Civ.P. 106(a)(4)(V) 7

Colo.R.Civ.P. 106(a)(4)(VIII) 7

Colo.Rev.Stat. § 13-51-105 ..... 2, 29

CONSTITUTIONS

U.S. Const. amend. I ..... *passim*

Colo. Const. art. III 1, 37

OPINIONS BELOW

The Tenth Circuit's opinion is published at *ZJ Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220 (10th Cir. 2002). (Pet. App. 1-39).[1] The Tenth Circuit's *Order* denying Petitioner's petition for rehearing en banc is unpublished. (Pet. App. 68-69). The District Court's *Order and Memorandum of Decision* is unpublished. (Pet. App. 40-67).

JURISDICTION

The Tenth Circuit denied Petitioner's timely petition for rehearing en banc on February 5, 2003. (Pet. App. 68-69). The *Petition for a Writ of Certiorari* was filed on May 2, 2003, and was granted on October 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech. . . ."

Article III of the Colorado Constitution, entitled "Distribution of Powers," provides:

> The powers of the government of this state are divided into three distinct departments,—the

[1] "Br. App. ___ a" refers to the appendix attached to the Brief of Petitioner. "Pet. App. ___" refers to the appendix attached to Petitioner's Petition for a Writ of Certiorari. "R. ___" refers to the record.

> legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

42 U.S.C. § 1983 is reproduced at Br. App. 48a; Section 13-51-105, Colo.Rev.Stat. (2003) is reproduced at Br. App. 48a.

Littleton's Adult Entertainment Establishment ordinance ("the Ordinance")[2] is reprinted in its current form in the appendix to this brief at Br. App. 12a-42a. The Ordinance has been amended three times since it was enacted in 1993. The Ordinance in its original form is contained in the petition appendix at pages Pet. App. 75-111. The Ordinance was amended on June 19, 2001, and this amendment is contained in the petition appendix at pages Pet. App. 112-116.

Littleton calls the Court's attention to two other amendments which have been made to the Ordinance which, while relevant to the issues in the case at bar, do not affect the question on which this Court granted certiorari. *See Diffenderfer v. Central Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 414 (1972) (per curiam) (this Court will "review the judgment . . . in light of [the] law as it now stands, not as it stood when the judgment below was entered") (citing *Hall v. Beals*, 396 U.S. 45, 48 (1969)); *see also Fusari v. Steinberg*, 419 U.S. 379, 387 n.12 (1975) (noting duty of counsel to inform the Court of amendments to the subject legislation after grant of certiorari).

[2] Also referred to as Littleton Colo. City Code § 3-14-1 (2003) *et seq.* Hereinafter the Littleton City Code shall be referred to as "LCC." References are to the Ordinance in its current form, unless otherwise noted.

The Tenth Circuit invalidated and severed, § 3-14-5(A) (Pet. App. 91) and LCC § 3-14-5(B)(10) (Pet. App. 93-94), which dealt with photographing and fingerprinting of license applicants and zoning certification. Littleton thereafter amended these provisions and LCC § 3-14-7 on June 3, 2003, and these amendments are at Br. App. 1a-4a. The Ordinance was amended most recently on November 18, 2003, and these amendments are at Br. App. 5a-11a. In relevant part, the amendments to LCC §§ 3-14-5(A)(B), 3-14-7 and 3-14-8 shorten even further the limited time periods within which city officials must act. LCC § 3-14-5(B) now requires the applicant to submit photographs and fingerprints with the application, thereby eliminating City involvement and any possible delay in the process. (Br. App. 23a-26a). LCC § 3-14-7 now requires that within five business days of the filing of an application, the zoning official shall issue a report confirming adherence to the locational requirements. Upon any failure to timely issue said report, the city clerk shall presume the proposed location is proper. (Br. App. 27a-28a). Additionally, if "any city official or department fails to render a timely decision pursuant to the terms of the ordinance, then said official or department shall be deemed to have approved or consented to the issuance of the requested license." LCC § 3-14-8(C) (Br. App. 30a).

STATEMENT

The Ordinance's Background and Purpose

The City of Littleton is a Colorado home-rule municipal corporation. The Ordinance, as originally passed in 1993, sets forth zoning and licensing requirements with regard to adult businesses. (Pet. App. 75-111). Before passing the Ordinance, the City Council considered evidence of the adverse secondary impacts of adult businesses, including increased crime, decreased property values, and urban blight. (Pet. App. 75-79, 82). As detailed in the legislative history and as memorialized in the preamble, the purpose and intent of the Ordinance is to prevent the deleterious secondary effects of adult businesses in the City. (Pet. App. 75-79, 82). On its face, as well as in its operation and effect, the Ordinance does not impose any limitations on the content of communicative materials or restrict adult access to protected speech. Moreover, the Ordinance targets secondary effects, not sexually explicit speech as such, by regulating adult businesses regardless of whether they feature protected expression.[3]

The first and second readings of the Ordinance were open to the public and held before the Littleton City

[3] The Ordinance governs adult motels, sexual encounter establishments and nude model studios. These types of adult businesses do not fall under the penumbra of First Amendment protections. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990) (plurality) (noting that "sexual encounter centers" are not protected); *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 447 (2002) (Kennedy, J., concurring in the judgment) (discussing massage parlors and other businesses not engaged in conduct commonly associated with expression).

Council on July 20, 1993, and on August 13, 1993, respectively. (R. 74). Various documents were disseminated to council members including: (1) a legal analysis of relevant case law; (2) specific proposals regarding sections of the Ordinance; (3) Littleton's zoning maps, which demarcated residential, business and industrial zones; (4) the proposed Ordinance; and (5) summaries of land-use studies documenting the secondary effects of adult uses. (R. 74, 117-148, 176). Littleton's assistant city attorney also discussed the right of adult businesses to open and operate in the City, balanced with the City's substantial interests in regulating the time, place and manner of such operations to prevent secondary effects. (R. 143-148). In an open forum, Littleton's City Council analyzed the Ordinance's various provisions, as well as the documentation which detailed the adverse secondary impacts associated with adult businesses. Several individuals spoke before the City Council. (R. 149-175). Following these hearings, Council passed the Ordinance.

Littleton's Adult Entertainment Establishment Ordinance

As noted above, in passing the Ordinance, Littleton relied upon the negative impact that other municipalities experienced related to adult businesses. LCC § 3-14-1 (Pet. App. 75-79, 82). To prevent such secondary effects, Littleton's Ordinance requires adult businesses to obtain a license, LCC § 3-14-4, and comply with specified time, place, and manner regulations. (Br. App. 23a). The Ordinance defines a variety of establishments specializing in sexually explicit fare including adult bookstores, adult cabarets and "sexual encounter centers." LCC § 3-14-2 (Br. App. 12a-20a).

The Ordinance sets forth eight specific, non-discretionary grounds upon which a license can be denied. LCC § 3-14-8(A) (Br. App. 28a-29a).[4] These standards foreclose any possibility that a licensing official's subjective views or personal opinions would affect any licensing decision. None of the grounds for denying a license in Littleton has anything to do with what the speaker might say.

Although the administrative time frames are not in dispute, LCC § 3-14-8(B) (Br. App. 29a-30a) sets forth brief time periods for the administrative process and ensures expeditious and mandatory judicial review in state court

[4] LCC § 3-14-8(A): The application of any applicant shall be approved or denied by the city clerk within fourteen (14) days of the date the application is filed with the city clerk. The city clerk shall deny a license if: (1) The applicant is under the age of eighteen (18) years; (2) The applicant has made a false statement upon the application or has given false information in connection with an application; (3) The applicant or any holder of any class of stock, or a director, officer, partner or principal of the applicant has had an adult business license revoked or suspended anywhere within the state within one year prior to the application; (4) The applicant has operated an adult business which has [been] determined to be a public nuisance under state law or this code within one year prior to the application; (5) A corporate applicant is not in good standing or authorized to do business in the state; or (6) The applicant is overdue in the payment to the city of taxes, fees, fines, or penalties assessed against him/her or imposed against him/her in relation to an adult business; (7) The applicant has not obtained the required sales tax license; (8) The applicant has been convicted of a specified criminal act within the five year period prior to the date the application is filed with the City Clerk. (Br. App. 28a-29a).

Specified criminal acts are defined in the Ordinance in LCC § 3-14-2 as "[s]exual crimes against children, sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, or pandering." (Br. App. 19a).

pursuant to Colo.R.Civ.P. 106(a)(4) (Br. App. 43a-47a).[5] The Ordinance provides for a maximum of 40 days from the time an application is submitted until an action pursuant to Colo.R.Civ.P. 106(a)(4) can be commenced. LCC § 3-14-8(B)(1-3) (Br. App. 29a-30a). An application shall be approved or denied within fourteen days of the date the application is filed with the city clerk. LCC § 3-14-8(A) (Br. App. 28a-29a). In the event of a denial, written findings of fact stating the basis for the denial shall be sent first class to the address shown on the application. LCC § 3-14-8(B) (Br. App. 29a). The applicant shall have the right to a hearing before the city manager, provided the request is made within ten days. LCC § 3-14-8(B) (Br. App. 29a). The hearing shall be held within fourteen days, and allows for statements and other evidence from enforcement officers, the applicant or other parties in interest and shall be held within fourteen days. LCC § 3-14-8(B) (Br. App. 29a). The city manager must issue an order based upon findings of fact within two days. LCC § 3-14-8(B)(2) (Br. App. 29a-30a).

Under Colo.R.Civ.P. 106(a)(4), any denial of a license which is affirmed by Littleton's city manager may be immediately appealed to state district court. The rule provides for mandatory review in the nature of certiorari. Pursuant to Colo.R.Civ.P. 106(a)(4)(VIII), the district court can accelerate the action if the court determines that acceleration is appropriate. Relief is available on Sundays and holidays. The court may also provide injunctive relief under Colo.R.Civ.P. 106(a)(4)(V) and Colo.R.Civ.P. 65. Moreover, the parties may challenge the constitutionality

[5] This does not preclude relief in the nature of mandamus under Colo.R.Civ.P. 106(a)(2) or injunctive relief in state or federal courts.

of ordinances under Colo.R.Civ.P. 106(a)(4). *Tri-State Generation and Transmission Co. v. City of Thornton*, 647 P.2d 670, 676 n.7 (Colo. 1982).

Through its narrowly tailored provisions, the Ordinance seeks to target the adverse secondary effects. For example, adult businesses are prohibited from allowing minors on the premises. The Ordinance also contains minimum lighting and interior configuration requirements designed to prevent sexual activities on the premises. LCC §§ 3-14-15, 3-14-16, and 3-14-17 (Br. App. 37a-41a).

Littleton's Ordinance also targets the negative secondary effects which spawn from adult businesses through its locational requirements. Littleton is divided primarily into three zoning categories—residential, business (including, in part, the B-2 zone) and industrial (including I-1 and I-2 zones).[6] Subject to certain distance requirements between churches, schools or childcare facilities, parks and correctional facilities, adult businesses are afforded a full opportunity to operate in Littleton's I-1 and I-2 zoned districts. LCC § 3-14-3 (Br. App. 21a-22a).

[6] The zoning requirements, upheld by the District Court and the Tenth Circuit, are not at issue here and, therefore, are described only peripherally.

The District Court and Tenth Circuit Proceedings

In August 1999, ZJ's opened an adult business[7] in a B-2 zoned district, which is not a zone district allowing for adult entertainment establishments, and has continued to operate since that time. Littleton took no action to prevent ZJ's opening. Upon opening, without applying for or having been denied an adult business license, ZJ's brought an action under 42 U.S.C. § 1983, challenging Littleton's Ordinance as unconstitutional on several theories, including void for vagueness, overbreadth, and prior restraint. ZJ's sought declaratory and injunctive relief, damages and attorneys' fees. (R. 8-28).

Littleton filed its motion for summary judgment (R. 70-115) and ZJ's filed its cross-motion for summary judgment. (R. 373-422). ZJ's primarily argued that it was not an adult business, that there were not enough I-1 and I-2 zoned sites in Littleton for adult businesses, and that the licensing provisions were an unconstitutional prior restraint. (R. 373-422).

The lower courts flatly rejected ZJ's contention that it is not an "adult business."[8] The District Court specifically

[7] ZJ's is an "adult bookstore, adult novelty store or adult video store" pursuant to LCC § 3-14-2. (Br. App. 13a-14a) (Pet. App. 83).

[8] As noted above, ZJ's falls under Littleton's definition of "adult bookstore, adult novelty store, or adult video store" in LCC § 3-14-2, which derives from the Detroit definition of "adult book store" detailed in *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50, 54 n.5 (1976), and reads as follows: "A commercial establishment which (a) devotes a significant or substantial portion of its stock-in-trade or interior floor space to; (b) receives a significant or substantial portion of its revenues from; or (c) devotes a significant or substantial portion of its advertising expenditures to the promotion of: the sale, rental or viewing of . . .

(Continued on following page)

noted that ZJ's restricts access to its store to adults and accordingly found that ZJ's considered itself an adult business. (Pet. App. 51). Moreover, it was undisputed that ZJ's sells a plethora of adult magazines, videos and other merchandise which vividly display anuses, vaginas, penises and closeups of sexual activities such as penial/vaginal contact, penial/anal contact, penial/mouth contact and ejaculation. (R. 213-284, 375). A review of a videotape tour of ZJ's, as well as floor plans, schematic drawings, affidavits and reports from city personnel, a detailed financial analysis of sales, products, and income derived from adult products by a certified public accountant, inventory and layout photographs, and ZJ's inventory lists made clear to the court the pervasively sexual nature of ZJ's business. (Pet. App. 51-52) (R. 213-372, 581 and Supplemental Appendix Vol II). The court found that ZJ's argument that it was not an adult business was "frivolous at best" and the court held that to define ZJ's as "anything

(items) which are characterized by the depiction or description of 'specified sexual activities' or 'specified anatomical areas' . . . " (Br. App. 13a-14a) (Pet. App. 83).

Specified anatomical areas are defined as: "(A) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus, or female breasts below a point immediately above the top of the areolae; or (B) Human male genitals in a discernibly turgid state, even if completely and opaquely covered." (Br. App. 19a) (Pet. App. 87-88).

Specified sexual activities are defined as: "(A) The fondling or other intentional touching of human genitals, pubic region, buttocks, anus, or female breasts; (B) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; (C) Masturbation, actual or simulated; or (D) Human genitals in a state of sexual stimulation, arousal or tumescence; (E) Excretory functions as part of or in connection with any of the activities set forth in subsections (A) through (D) of this definition." (Br. App. 19a-20a) (Pet. App. 88).

other than an adult entertainment establishment would be absurd and totally devoid of any basis on the record." (Pet. App. 51-52).[9] The court was sufficiently "disturbed by the frivolous and incredulous argument" made by ZJ's that it cautioned ZJ's counsel concerning Fed.R.Civ.P. 11. (Pet. App. 55 n.2).

Following *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), the court found that Littleton's Ordinance "is narrowly tailored to serve a significant governmental interest. . . ." (Pet. App. 60). Rejecting ZJ's contention that there are not enough available sites, the court found that there is sufficient land available for adult uses, i.e., that the Ordinance "leaves open ample alternative channels of communication." (Pet. App. 60-63).

In granting Littleton's motion for summary judgment, the District Court discussed the rationale of this Court's prior restraint cases and concluded that the Ordinance is not a prior restraint of protected speech. The court specifically held that the Ordinance does not place unbridled discretion in the hands of Littleton officials to either

[9] The District Court found: "Plaintiff's estimate that thirty-three percent of its business is adult or sexual in nature appears to be far below the actual figure. Defendant has submitted evidence suggesting that the portion of Plaintiff's inventory that is sexual and adult in nature is closer to fifty percent. (Def.'s Br., Ex. D [Video], Ex. E [Photographs], Ex. F [Inventory List], Ex. G [Expert Reports].) After reviewing the photographs taken of the display cases in Plaintiff's store and the video segment touring the store, I find Plaintiff's argument that it is not an adult entertainment establishment frivolous at best. To define Plaintiff as anything other than an adult entertainment business would be absurd and totally devoid of any basis on the record." (Pet. App. 51 n.1).

approve or deny a license, that it requires a licensing decision in a brief, specified period of time, and that it, when combined with Colo.R.Civ.P. 106, provides adequate procedural safeguards, including an avenue for prompt judicial review. (Pet. App. 63-65). The court concluded that ZJ's did not have standing to challenge the constitutionality of the Ordinance under the void for vagueness doctrine, but that in any event, Littleton's Ordinance was not void for vagueness or overbroad. Ultimately the court dismissed all of ZJ's claims. (Pet. App. 40-67).

ZJ's appealed the District Court's Order in its entirety to the Tenth Circuit. The Tenth Circuit affirmed in part and reversed in part. (Pet. App. 1-39). Having reviewed the District Court record, including the videotape of the interior of ZJ's business, the Tenth Circuit concluded that ZJ's was "unquestionably" an adult business. (Pet. App. 12 n.6). Drawing all inferences in favor of ZJ's, the Tenth Circuit agreed with the District Court that Littleton, whose real estate expert identified more than twenty sites where ZJ's could legally operate, provided sufficient land zoned for adult businesses. (Pet. App. 33-38). The Tenth Circuit also concluded: ZJ's lacked standing to challenge the Ordinance's civil disability provisions, as well as the Ordinance's revocation and suspension provisions (Pet. App. 11); the Ordinance was not void for vagueness (Pet. App. 12-14); and the Ordinance does "not involve discretion on the part of the licensing official." (Pet. App. 29 n.13).

The Tenth Circuit did find for ZJ's on two of its challenges to the licensing provisions. First, the Tenth Circuit found that, notwithstanding the 30-day deadline for licensing decisions, the failure to specify a time frame for the zoning official to issue a statement of compliance,

section LCC § 3-14-5(B)(10), or for the Police Department to take an applicant's photograph and fingerprints, section LCC § 3-14-5(A), created a risk of undue delay. (Pet. App. 22-23). These requirements were severed from the Ordinance by the Tenth Circuit and, as noted above, were subsequently amended. (Pet. App. 20-24). Second, of particular relevance here, the Tenth Circuit ruled that *FW/PBS* mandates that a city guarantee that a judge issue a prompt decision upon judicial review of a license denial. (Pet. App. 25-33). Because Colo.R.Civ.P. 106(a)(4) permits, but does not require, a "prompt final decision," (Pet. App. 32), on a court challenge to a license denial, the Tenth Circuit invalidated Littleton's judicial review provision.

Littleton then filed a petition for rehearing en banc (Pet. App. 117-132) which was denied. (Pet. App. 68-69). ZJ's filed a petition for rehearing which was also denied.

SUMMARY OF ARGUMENT

I. The plurality opinion in *FW/PBS* emphasized the distinctions between censorship schemes designed to prohibit speech based on content and licensing procedures designed to implement content-neutral time, place, and manner regulations. 493 U.S. at 229. The former are presumptively invalid under the First Amendment and require prompt judicial determinations to ensure that a censor has not erred in determining "that the [expression] is unprotected." *Freedman v. Maryland*, 380 U.S. 51, 59 (1965). In the latter, however, an official "does not exercise discretion by passing judgment on the content" of expression, but rather applies narrow, objective standards to further content-neutral interests, "a ministerial action

that is not presumptively unconstitutional." *FW/PBS*, 493 U.S. at 229; *id.* at 246 (White, J., joined by Rehnquist, C.J., concurring in part and dissenting in part). Thus, the *FW/PBS* plurality held that "[l]imitation on the time within which the licensor must issue the license as well as the *availability* of prompt judicial review satisfy the 'principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *Id.* at 230 (emphasis supplied) (citation omitted).

There is no basis to retreat from the view of the *FW/PBS* plurality and extend the "prompt judicial determination" requirement to encompass appeals from ministerial licensing rulings. Neither rationale of the *Freedman* approach is present in this case. Under Littleton's Ordinance, the licensing official applies objective standards which do not require the judicial expertise necessary to draw "the line between legitimate and illegitimate," or unprotected, speech. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). Nor is self-censorship afoot. Whereas a license denial in a censorship scheme may discourage the speaker from seeking judicial review, *FW/PBS* recognized that such is not the case with ministerial licensing decisions where an entire business is at stake. *FW/PBS*, 493 U.S. at 229-230. Moreover, because Littleton's standards are specified and clear, any error in a licensing decision would be obvious and "remedied promptly by judicial intervention." *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272, 284 (Colo. 1995) (detailing availability of prompt judicial review under Colo.R.Civ.P. 106(a)(4)).

ZJ's arguments for expanding the "prompt judicial decision" requirement to this context are unavailing. First, ZJ's newly-minted "unbridled discretion" argument—

based on an unsuccessful claim that the definition of adult bookstore is vague—is waived because it was never presented in the lower courts. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). Moreover, the argument is irrelevant to the prior restraint doctrine, which is concerned not with whether the Ordinance covers ZJ's store, but with whether the city has unbridled discretion "in deciding *whether or not to withhold a permit*." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969) (emphasis supplied).

ZJ's second argument, alleging that the Ordinance is a "content-based" prior restraint, fails for the same reason: while some adult businesses are covered by the Littleton Ordinance by virtue of their specialization in sexually explicit fare, content plays no role whatsoever in the decision to grant or withhold a license. More important, ZJ's assertion is contrary to all of the relevant decisions from this Court, which hold that adult business ordinances targeting secondary effects are to be evaluated as content-neutral under this Court's test for time, place, and manner regulations. *See, e.g., City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Littleton's Ordinance does not control the content of any speech and is "*justified* without reference to the content of the regulated speech." *Id.* at 48 (alteration in original) (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976)). Finally, the Court's cases teach that targeting the secondary effects of adult businesses makes Littleton's Ordinance narrowly tailored, not content based. *City of Renton*, 475 U.S. at 52 (noting that by targeting adult businesses, Renton's ordinance avoided the overbreadth flaw identified in previous cases). Thus, Littleton's Ordinance is more appropriately analyzed as a time, place,

and manner regulation. *Thomas v. Chicago Park District*, 534 U.S. 316, 323 (2002).

The Littleton Ordinance contains narrow, objective standards "to guide the official's decision and render it subject to effective judicial review." *Id.* at 323. The eight specific grounds for license denial specified in the Ordinance, LCC § 3-14-8(A) (Br. App. 28a-29a), are relevant not to content, but to the city's time, place, and manner regulations and "do not involve discretion on the part of the licensing official." (Pet. App. 29 n.13). Thus, "*Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation . . ." *Thomas*, 534 U.S. at 322. Moreover, the Ordinance contains fixed administrative time limits for the licensing decision, thus avoiding the "undue delay" problem found in the Dallas ordinance in *FW/PBS*. Under LCC § 3-14-8, the City will complete its review of an application, *both* as an initial matter and on administrative appeal, within 40 days. Immediately thereafter, an aggrieved applicant may promptly commence judicial proceedings pursuant to Colo.R.Civ.P. 106(a)(4), under which the district court can grant interim relief or entertain constitutional claims. *City of Colorado Springs*, 896 P.2d at 282-284. The ministerial nature of the City's licensing decision, the procedural protections provided in the Ordinance, and the availability of prompt, effective judicial review under state law all counsel against imposing a "prompt judicial determination" requirement in this context.

II. Such a requirement would be inherently unworkable. City councils, as well as state legislatures, are precluded by the separation of powers from imposing constraints on the judiciary. *See In the Interest of J.E.S.*, 817 P.2d 508, 511 (Colo. 1991) (holding that "the courts must be independent, unfettered, and free from directives, influence, or interference" from the legislature). Moreover, such a vast expansion of the *Freedman* line of cases would produce perverse results that harm municipal and judicial interests. As an initial matter, a "prompt judicial decision" rule would elevate the protections given to sexually oriented businesses above those afforded political speech at the core of the First Amendment, contrary to this Court's consistent recognition that the interests involved here are "of a wholly different, and lesser, magnitude" than the interest in protecting discourse on matters of public concern. *Young*, 427 U.S. at 70; *City of Erie v. Pap's A.M.*, 529 U.S. 277, 293 (2000).

A prompt judicial decision rule would also eviscerate municipalities' ability to control secondary effects through objective licensing procedures that implement content-neutral time, place, and manner regulations. Accepting ZJ's view that any adult business has the *per se* right to operate until a court concludes otherwise would undermine cities' substantial interest in preventing the decreased property values, crime, and urban blight associated with sexually oriented businesses—an interest properly characterized an "undeniably important." *City of Erie*, 529 U.S. at 296. The procedural "band-aids" suggested by the lower courts have just this effect. While a "provisional license" to allow an unqualified or offending business to continue operation during judicial review certainly obviates any restraint, the countervailing harm to the public interest—absent in the *Freedman* line of cases—is substantial. Respondent, failing to recognize the sea change its view would work in municipal law and the role of the courts, also ignores the myriad of other constitutionally permissible regulations that its rule would invalidate. *See, e.g., Jews for Jesus, Inc. v. Massachusetts Bay Transp.*

Authority, 984 F.2d 1319, 1327 (1st Cir. 1993) (considering permit requirement for noncommercial expressive conduct, and construing *FW/PBS* to require only access to prompt judicial review); *Graff v. City of Chicago*, 9 F.3d 1309, 1324 (7th Cir. 1993) (en banc) (construing *FW/PBS* in context of newsrack permit ordinance). The First Amendment does not compel such a result when municipalities implement time, place, and manner regulations pursuant to objective, content-neutral licensing standards.

ARGUMENT

I. Under *FW/PBS*, Littleton's Ordinance Satisfies the First Amendment Because It Provides for Prompt Commencement of Judicial Review.

This Court's cases establish that a "city may require periodic licensing, and may even have special licensing procedures for conduct commonly associated with expression." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 760 (1988); *Young*, 427 U.S. at 62 ("The fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances"). The settled rule is that a licensing mechanism for enforcing time, place, and manner regulations is constitutional if it contains narrow, objective standards that "guide the official's decision and render it subject to effective judicial review." *Thomas*, 534 U.S. at 323.

However, a "licensing standard which gives an official authority to censor the content of a speech differs *toto coelo* from one limited by its terms, or by nondiscriminatory practice, to considerations of public safety and the

like." *Id.* at 322-323 (quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951)). When censorship is afoot, this Court has required stringent safeguards to protect freedom of expression. Thus, *Freedman* held that a state board of censors had the burden of securing a prompt judicial decision confirming an order prohibiting exhibition of a film. *Freedman*, 380 U.S. at 58; *see also Teitel Film Corp. v. Cusack*, 390 U.S. 139, 141 (1968) (per curiam) (requiring "a prompt judicial decision *on the question of the alleged obscenity* of" a work that has been censored) (emphasis supplied); *Southeastern Promotions*, 420 U.S. 546 (applying requirement to a municipal review board operating with unbridled discretion to determine, based on content, the stage productions that could occur at municipal theaters).

In contrast to decisions addressing content-based censorship schemes, this Court did not impose the "prompt judicial determination" requirement when it reviewed an adult business licensing ordinance in *FW/PBS*, 493 U.S. 215. Justice O'Connor's opinion for the plurality emphasized the distinction between censorship schemes and objective licensing standards that implement content-neutral regulations: "[T]he city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, *a ministerial action that is not presumptively invalid*." *Id.* at 229 (emphasis supplied); *see also id.* at 246 (White, J., joined by Rehnquist, C.J., concurring in part and dissenting in part) (noting that Dallas ordinance did "not vest undue discretion" in deciding whether to grant a license). Thus, the licensing procedure "does not present the grave 'dangers of a censorship system.'" *Id.* at 228 (quoting *Freedman*, 380 U.S. at 58).

The plurality accordingly concluded that the First Amendment requires a municipality to guarantee only the "possibility" or "availability" of "prompt judicial *review*," *FW/PBS*, 493 U.S. at 228 (emphasis supplied), rather than, as was required in *Freedman* and its progeny, a "prompt judicial *determination*," *Freedman*, 380 U.S. at 60 (emphasis supplied).[10] The plurality's conclusion followed directly from *Southeastern Promotions* and *Freedman*, which concluded that the "prompt judicial determination" requirement rests on essentially the same premise as the procedural safeguard, not applicable to ministerial licensing, requiring censors to institute judicial proceedings to confirm their decisions. *Southeastern Promotions*, 420 U.S. at 560; *Freedman*, 380 U.S. at 58.[11]

[10] Thus, although the *FW/PBS* plurality described this procedural safeguard as "essential," it did not conclude that, in the unique context of ministerial licensing decisions, "prompt judicial review" means the issuance of a judge's decision on a fixed, accelerated timetable. *See also City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 281 (2001) (noting that the opinion announcing the judgment in *FW/PBS* stated that "[u]nsuccessful applicants for an adult business license . . . must be accorded 'an avenue for prompt judicial review.'") (quoting *FW/PBS*, 493 U.S. at 229)).

[11] The short-hand version of *Freedman's* three procedural safeguards for censorship schemes, initially stated in Justice Douglas's *Freedman* concurrence, *id.* at 62, and repeated in *FW/PBS*, 493 U.S. at 227, is not particularly helpful in a case such as this. Justice Douglas, of course, concurred in the decision to strike the Maryland statute, but reiterated his oft-stated position that "I do not believe any form of censorship—no matter how speedy or prolonged it may be—is permissible." *Freedman*, 380 U.S. at 61-62. Thus, the more accurate explanation of *Freedman's* three requirements is not found in Justice Douglas's summary list, but in the explanation of the safeguards provided in the majority opinion. *Id.* at 58-60. Careful review reveals that each safeguard was specifically grounded in the content-based nature of the censor's determination:

(Continued on following page)

The Littleton Ordinance makes "prompt judicial review" "available" to adult businesses, as required by the *FW/PBS* plurality. Under the fixed time limits set by the Ordinance, the City will complete its review of an application, *both* as an initial matter and on administrative appeal, within 40 days. LCC § 3-14-8(A)&(B) (mandating initial decision within 14 days, providing 10 days to file notice of appeal, requiring hearing within 14 days of notice and mandating decision within 2 days thereafter); *cf. Thomas*, 534 U.S. at 318-319 (noting final administrative decision provided within 42 days). Additionally, although the adult business is given up to 10 days to file a notice of administrative appeal, that essentially *pro forma* notice takes almost no time to prepare and file, enabling the applicant to obtain a final administrative order within as little as 30 or 31 days of filing its application.

That order is immediately appealable pursuant to Colo.R.Civ.P. 106(a)(4). *City of Colorado Springs*, 896 P.2d at 282-284 (noting that district court may grant interim relief, accelerate any action requiring acceleration, entertain constitutional claims, noting that any threat to free

> First, the burden of *proving that the film is unprotected* expression must rest on the censor. . . . Second, . . . the requirement cannot be administered in a manner which would lend an effect of finality to the censor's determination *whether a film constitutes protected expression*. . . . Moreover, . . . an administrative refusal to license, signifying the censor's *view that the film is unprotected*, may have a discouraging effect on the exhibitor. *Therefore*, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

Id. at 58-59 (citations omitted) (emphasis supplied).

expression "may be remedied promptly by judicial intervention," and concluding that Colo.R.Civ.P. 106(a)(4) satisfies *FW/PBS*'s requirement of prompt judicial review). The Littleton Ordinance therefore provides a quick exit from the administrative process and immediate access to, as discussed below, "effective judicial review." *Thomas*, 534 U.S. at 323.

A. The Rationales of *Freedman's* Prompt Judicial Decision Requirement Are Inapposite to Littleton's Ordinance.

As explained in *Freedman* and *Shuttlesworth* and reiterated in *FW/PBS*, two fundamental concerns justify *Freedman's* stringent procedural safeguards. The first is the judicial expertise necessary to supervise censorship schemes, because "the line between legitimate and illegitimate speech is often so finely drawn," *Southeastern Promotions*, 420 U.S. at 559, and the censor will tend to err on the side of disallowing speech. The second is the risk of self-censorship because the license denial "may have a discouraging effect on the exhibitor," *Freedman*, 380 U.S. at 59, such that the administrative action may be tantamount to suppression of the speech.

The *FW/PBS* plurality addressed both issues squarely. First, the judicial expertise rationale is inapposite because an objective licensing standard involves only "ministerial action that is not presumptively invalid." *FW/PBS*, 493 U.S. at 229. Thus, the plurality held that in such situations, a city does not bear the burden of going to court, nor the burden of proof once in court. *Cf. Freedman*, 380 U.S. at 58 (requiring the censor to bear the "burden of proving the film is unprotected"). The plurality's conclusion in this regard is directly relevant to the judicial

review requirement, because relieving the government of the burden of proof concerning a ministerial licensing decision demonstrates that this is not a case "[w]here the transcendent value of speech is involved." *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

While an adult business owner will likely have the financial incentive to challenge a regulation, this Court's cases reveal that "the central concern of the First Amendment in this area is that there be a free flow from creator to audience of whatever message a film or a book might convey." *Young*, 427 U.S. at 77 (Powell, J., concurring in the result). This "central concern" is not involved here, where "none of the grounds for denying a permit has anything to do with what a speaker might say." *Thomas*, 534 U.S. at 322. Littleton's licensing standards have nothing to do with the content of speech nor do they prescribe the size, shape, color, texture, flavor, content, or message of any adult products which are sold. Creators and sellers of adult products are free in Littleton to explore the full range of their imagination and creative expression.

Second, the *FW/PBS* plurality explained that content-neutral licensing decisions do not raise the specter of self-censorship. In *Freedman*, it was the discouraging effect of a license denial based on the content of speech that could cause the exhibitor "to be deterred from challenging the decision to suppress the speech, and, therefore, the censor's decision to suppress was tantamount to complete suppression of the speech." *FW/PBS*, 493 U.S. at 229. Such a concern is plainly absent in ministerial licensing decisions: "Because the license is the key to the applicant's obtaining and maintaining a business, there is every

incentive for the applicant to pursue a license denial through court." *Id.* at 229-230.

The lack of the self-censorship rationale here is dispositive, because it was the *very reason* the *Freedman* Court imposed the prompt judicial determination requirement:

> [A]n administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan*, *supra*. Therefore, the procedure must also assure a prompt final judicial decision, *to minimize the deterrent effect of an interim and possibly erroneous denial of a license*.

Freedman, 380 U.S. at 59 (emphasis supplied).

Ironically, ZJ's did not engage in self-censorship—rather, it brazenly opened and has continually operated in an improperly zoned area despite rulings from the District Court and the Tenth Circuit.

After discussing the absence of these rationales in objective permitting decisions, the *FW/PBS* plurality dispensed with the requirement—mentioned first and foremost in the *Freedman* opinion, *id.* at 58—that the government bear the burdens of proof and prosecution. *FW/PBS*, 493 U.S. at 230 ("Because of these differences . . . the city does not bear the burden of going to court to effect the denial of a license application"). Rather, the plurality specifically concluded that "[l]imitation on the time within which the licensor must issue the license as well as the *availability* of prompt judicial review satisfy the 'principle that the freedoms of expression must be

ringed about with adequate bulwarks.'" *Id.* (citation omitted) (emphasis supplied).

There is no basis to retreat from the view of the *FW/PBS* plurality and extend the "prompt judicial determination" requirement to encompass appeals from ministerial licensing rulings. A straightforward review of *Freedman* shows that its prompt judicial decision requirement does not apply of its own force to the Littleton Ordinance. Although ZJ's invokes the "prior restraint" doctrine and urges this Court to "mechanically apply the doctrines developed in other contexts," *Young*, 475 U.S. at 76 (Powell, J., concurring), this Court has long recognized, especially in the First Amendment realm, that "broad statements of principle, no matter how correct in the context in which they are made," cannot answer novel questions in significantly different contexts. *Id.* at 65 (plurality opinion of Stevens, J.); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 n.5 (1992) ("It is of course contrary to all traditions of our jurisprudence to consider the law on this point conclusively settled by broad language in cases where the issue was not presented or even envisioned"); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957) (noting that, even in a censorship case, "the phrase 'prior restraint' is not a self-wielding sword" or a "talismanic test," but that each claim must be analyzed against "the operation and effect of the statute in substance") (quoting *Near v. Minnesota*, 283 U.S. 697, 713 (1931)).

Such observations are especially appropriate here, where unbridled discretion—the *sine qua non* of prior

restraint—is absent from the Littleton Ordinance.[12] Thus, Littleton's Ordinance is more properly analyzed as a time, place, and manner regulation. *Thomas*, 534 U.S. at 316 (identifying procedural requirements for time, place, and manner regulation).

B. ZJ's "Substantial or Significant" Argument is Not an Unbridled Discretion Argument At All, But a Meritless Vagueness Challenge Irrelevant to the Question Presented.

ZJ's has not, and cannot, contend that the Littleton Ordinance permits city officials to deny a license based on the content of any communication. As ZJ's notes[13] and the lower courts confirmed, Littleton's licensing decision "does not involve discretion on the part of the licensing official." (Pet. App. 29 n.13 and 65) (holding that "the Littleton city clerk does not have unbridled discretion to either approve or deny a license").[14]

[12] Well-reasoned opinions of the courts of appeals are in accord. *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 707 (5th Cir. 1994) ("The order, by its own terms, combats pernicious side effects of adult businesses" and "does not censor"); *Graff*, 9 F.3d at 1331 (Flaum, J., concurring) ("Moreover, uncritically extending *Freedman*'s reach to strike down the ordinance for lack of judicial review, by attributing broad significance to language in later cases that dealt with schemes substantially dissimilar from the one at issue here, would embark us on a senseless departure from the core logic undergirding the holdings in *Freedman* and its progeny; for neither the purpose nor effect of the ordinance, unlike the laws challenged in that line of cases, is to involve the licensor in any decision-making of constitutional proportion.")

[13] Resp. Brf. in Opp. Pet. 6.

[14] ZJ's Brief in Opposition to the Petition also does not argue that the Littleton Ordinance suffers from the "undue delay" strand of unbridled discretion which infected the Dallas ordinance at issue in

(Continued on following page)

Faced with this reality, ZJ's fashions a new argument—raised for the first time in this Court—that the City's failure to specifically define the phrase "significant or substantial" in the definition of adult bookstore renders the Littleton Ordinance an unconstitutional prior restraint. ZJ's Brf. in Opp. to Pet. at 6 ("While the *criteria for granting* a license have been held to provide objective standards, the *requirement for a license* itself involves the exercise of broad discretion by Littleton City officials") (emphasis supplied).

As an initial matter, this argument has been waived because it was never presented below. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *NCAA v. Smith*, 525 U.S. 459, 470 (1999) (noting that the Court will consider only questions properly presented in or passed upon by the court below). To be sure, ZJ's mounted

FW/PBS. 493 U.S. at 227 (invoking prior restraint analysis to invalidate the Dallas ordinance because city-conducted inspections, which were prerequisites to licensure, were not mandated within a specific time frame). This is logical, given that the Tenth Circuit severed the provisions requiring the zoning officer's letter of compliance and photographs and fingerprints administered by the police department. (Pet. App. 22, 24). Additionally, these provisions have subsequently been amended to require the zoning official's letter within five days of a request (or the location is deemed compliant) and have eliminated the City's involvement in administering photographs or fingerprints. LCC §§ 3-14-7; 3-14-5(B)(11) (Br. App. 26a-28a). Moreover, the Ordinance specifically provides that: "If any city official or department fails to render a timely decision pursuant to the terms of this ordinance then said official or department shall be deemed to have approved or consented to the issuance of the requested license." LCC § 3-14-8(C) (Br. App. 30a). Thus, since both of the "evils" that are the hallmark of prior restraint analysis—amorphous standards and undue delay—are absent here, this case is distinguishable from not only *FW/PBS*, but also from all of this Court's prior restraint decisions.

challenges to "substantial or significant" below—but those arguments were vagueness and overbreadth challenges that were flatly rejected. (Pet. App. 12 n.4) (rejecting vagueness challenge, finding that the Ordinance is "unquestionably applicable" to ZJ's, and affirming that ZJ's lacked standing under *Young*, 427 U.S. at 60-61, to bring the vagueness challenge) (Pet. App. 51-55) (rejecting vagueness and overbreadth challenges and commenting that ZJ's claim that it was not an adult bookstore was "frivolous at best" and based on "incredulous arguments").

Moreover, the claim that the phrase "substantial or significant" is vague is irrelevant to any cognizable theory of unbridled discretion. This Court has never held that the determination of whether a regulation *applies* to a particular business, or even to a course of expressive conduct, is itself an act of unbridled discretion. Rather, it is "unbridled discretion with respect to the criteria used in deciding *whether or not to grant a license*" that is "deemed to convert an otherwise valid law into an unconstitutional prior restraint." *FW/PBS*, 493 U.S. at 246 (White, J., joined by Rehnquist, C.J., concurring in part and dissenting in part) (citations omitted); *Shuttlesworth*, 394 U.S. at 150 (finding unconstitutional prior restraint because "in deciding *whether or not to withhold a permit*, the members of the Commission were to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'") (emphasis supplied).

The Ordinance lacks such discretion. Even if an establishment's inventory consisted solely of obscene material, Littleton must promptly grant a license if the applicant meets the straightforward standards of its Ordinance. LCC § 3-14-8 (mandating that application for a license "shall be approved" unless applicant is disqualified pursuant to one of eight objective standards). Where, as

here, it is admitted that the City lacks discretion to deny licenses to qualified applicants, the impetus for *Freedman's* prompt judicial decision requirement is wholly lacking.[15]

Finally, it bears noting that an adult business has at least two avenues to bring a constitutional challenge, directly in court, without any delay whatsoever, to either the requirement that it obtain a license or, as discussed below, to the substantive time, place, and manner regulations in the ordinance. First, an adult business can bring a declaratory judgment action in state court. *See* § 13-51-105 Colo.Rev.Stat. (2003). Second, just as ZJ's did here, an adult business can bring an action in federal court under 42 U.S.C. § 1983. *See generally Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982) (no administrative exhaustion requirement applies to section 1983 actions). These avenues of judicial review, of course, are in addition to the procedure made available under Colo.R.Civ.P. 106(a)(4) to any applicant denied a license under the Ordinance's specific standards.

C. ZJ's "Content-Based" Argument is Not Only Irrelevant to Prior Restraint Analysis, But Also Directly Contrary to this Court's Adult Business Cases.

ZJ's proffers a second reason for imposing *Freedman's* "prompt judicial determination" requirement on municipal

---

[15] Indeed, the absence of any discretion in the licensing decision may divest ZJ's of standing to bring this challenge. "Since respondent does not claim that city officials enjoy unguided discretion to deny the right to speak altogether, it is open to question whether respondent's claim falls within the narrow class of permissible facial challenges to allegedly unconstrained grants of regulatory authority." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).

ordinances such as the one at bar: they are allegedly content-based by virtue of being directed at sexually oriented businesses. Resp. Brf. in Opp. to Pet. 3 (claiming that the Ordinance regulates "on the basis of the content"). This argument, however, suffers from the same critical defect as the previous contention—the City's act of defining a category of regulated land uses or businesses does not in any way give the City discretion "in deciding whether or not to withhold a permit." *Shuttlesworth*, 394 U.S. at 150. Thus, ZJ's substantive attack—rejected by the lower courts (Pet. App. 33 n.15 and 57-59)—adds nothing to its procedural contention that *Freedman's* "prompt judicial determination" requirement should apply here.

ZJ's argument to treat the Ordinance as "content-based" fails for another reason: it is directly contrary to every relevant decision of this Court. *Young*, 427 U.S. at 71-72 (plurality); *id.* at 78 (Powell, J., concurring) (holding that adult business ordinance "has silenced no message, has invoked no censorship, and has imposed no limitation upon those who wish to view [sexually explicit films]"); *City of Renton*, 475 U.S. at 48 ("In short, the Renton ordinance is completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech'") (citations omitted); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 585 (1991) (Souter, J., concurring in judgment) (upholding nudity ban as applied to adult businesses and concluding that "the governmental interest in combating prostitution and other criminal activity is not at all inherently related to expression"); *City of Erie*, 529 U.S. at 295 (plurality opinion) (same); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (plurality opinion) (explaining that "*Renton* requires that municipal ordinances receive only intermediate scrutiny" when

directed at secondary effects); *id.* at 445, 448 (Kennedy, J., concurring in the judgment) (noting that content-neutral label is "imprecise," but that "the central holding of *Renton* is sound" because controlling secondary effects is a content-neutral justification).

In short, it is well-settled that adult business ordinances aimed at secondary effects are evaluated under the standard for content-neutral time, place, and manner regulations because they do not control the content of any expression and are "*justified* without reference to the content of the regulated speech." *City of Renton*, 475 U.S. at 48 (alteration in original) (quoting *Virginia State Board of Pharmacy*, 425 U.S. at 771). This is amply demonstrated by the fact that Littleton's substantive time, place, and manner regulations[16] are clearly designed to further

[16] In addition to location requirements, which were challenged and upheld below—Pet. App. 37-38, *id.* at 62-63—the Littleton Ordinance contains, *inter alia*, regulations establishing hours of operation, LCC § 3-14-14, prohibiting physical contact between nude dancers and patrons, LCC § 3-14-15(A)(9) (Br. App. 38a), forbidding completely enclosed "peep booths," LCC § 3-14-15(B) (Br. App. 39a-40a), and establishing minimum lighting requirements, LCC § 3-14-17 (Br. App. 41a). These content-neutral regulations constitute public health and safety requirements similar to the hours, traffic, and safety regulations upheld in *Thomas* and properly subjected to only the normal processes of judicial review. *Thomas*, 534 U.S. at 322-324 (following, *inter alia*, *Cox v. New Hampshire*, 312 U.S. 569 (1941), and *Poulos v. New Hampshire*, 345 U.S. 395 (1953) (requiring applicant denied permit for expressive activity to seek judicial review)). Moreover, they are precisely the kind of adult business regulations upheld by this Court in *Renton* and *Erie* and by the courts of appeals in numerous decisions. *See, e.g.*, *Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153 (9th Cir. 2003) (hours of operation); *Spokane Arcade, Inc. v. City of Spokane*, 75 F.3d 663 (9th Cir. 1996) (open booth requirements); *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir. 1997) (buffers between patrons and erotic dancers).

its interest in preventing secondary effects—decreased property values, crime, and urban blight—a government interest which does not turn on the psychological effect speech may have on its listeners. *Boos v. Barry*, 485 U.S. 312, 320-321 (1988) (distinguishing *Renton* from content-based restrictions on speech).

Additionally, the Littleton Ordinance "is not limited to expressive activities," *City of Los Angeles*, 535 U.S. at 447, but rather regulates all sex-oriented enterprises including, for example, "sexual encounter centers" not engaged in protected expression. LCC § 3-14-2 (Br. App. 12a-21a). Thus, the Ordinance "is not even directed to communicative activity as such," *Thomas*, 534 U.S. at 322, but at a category of land uses associated with secondary effects. LCC § 3-14-1 (Br. App. 12a) (noting that ordinance has "neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials," but is aimed at limiting "the adverse secondary effects" of adult businesses); *see also City of Erie*, 529 U.S. at 297 (holding that city could rely on evidentiary foundation in *Young* and *Renton* "that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood").

Finally, ZJ's "content-based" argument runs headlong into this Court's narrow tailoring standard for adult business regulations, which *requires* the Ordinance to affect only adult businesses, "thus avoiding the [overbreadth] flaw that proved fatal to the regulations in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975)." *City of Renton*, 475 U.S. at 52 (clarification added); *see also FW/PBS*, 493 U.S. at 244 (White, J., concurring in part and dissenting in part) (noting that *Renton* and *Young*

teach that adult business regulations, "although focusing on a limited class of businesses," are to be treated as content-neutral); *Barnes*, 501 U.S. at 585 n.2 (1991) (Souter, J., concurring in judgment) (holding that regulation would be suspect if applied outside the secondary effects context of *Renton*-type adult entertainment).

Relying on this Court's precedents, the text of the Littleton Ordinance, and the legislative and judicial record in this case, the District Court found that the Ordinance is "narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication." (Pet. App. 60). Given this conclusion—which is not challenged here—it cannot be "suggested that the prerequisites for obtaining a license, such as certificates of occupancy and inspections, do not serve the same kind of substantial government interest dealt with in [*Young* and *Renton*] nor that the licensing system fails the test of content neutrality." *FW/PBS*, 493 U.S. at 245 (White, J., concurring in part and dissenting in part) (clarification added).

D. The Littleton Ordinance Contains Narrow, Objective Standards that Guide the Licensing Decision and Render it Subject to Effective Judicial Review.

Under Littleton's Ordinance, an applicant shall be granted a license within 14 days of application unless one of eight specific reasons justifies denial. LCC § 3-14-8(A) (Br. App. 28a-30a). These straightforward reasons go to whether the applicant is underage, has lied on the application, has recently operated an adult business illegally in the state, is a corporation not in good standing, is overdue on monies owed to the city in relation to an adult business,

does not have a sales tax license, or has recently been convicted of certain sex-related or sex-business related crimes. *Cf. Thomas*, 534 U.S. at 319 n.1 (upholding regulation allowing permit denial based upon, *inter alia*, a material misrepresentation in the application, prior damage to Park District property, outstanding debts to the Park District, failure to comply with "licensure requirements . . . concerning the sale . . . of any goods or services," or a finding that the proposed use is "inconsistent with the classifications and uses of the park" or "would present an unreasonable danger to . . . health or safety").

As the Tenth Circuit noted, Littleton's grounds for license denial "do not involve discretion on the part of the licensing official." (Pet. App. 29 n.13); *cf. Thomas*, 534 U.S. at 324 (noting that grounds for denial "are reasonably specific and objective, and do not leave the decision 'to the whim of the administrator'") (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 (1992)).

The City's objective standards for license denial demonstrate that the judicial expertise rationale underlying the *Freedman* prompt judicial decision requirement is simply inapposite. *Thomas*, 534 U.S. at 322 ("*Freedman* is inapposite because the licensing scheme at issue here is not subject-matter censorship but content-neutral time, place, and manner regulation . . ."). Littleton's standards do not require fine line-drawing between protected and unprotected speech—a task properly left to the judiciary—but instead involve content-neutral determinations which are within the traditional realm of municipal expertise.

Characterizing Littleton's Ordinance as a time, place, or manner regulation enforced by ministerial licensing

does not mean that the aggrieved adult business applicant is bereft of procedural protections. The applicant is guaranteed an initial decision within 14 days. LLC § 3-14-8(A). Within 10 days after a license denial, an applicant may request an administrative appeal hearing before the city manager which must be conducted within fourteen days of the request, LCC § 3-14-8(B), and at which the adult business is entitled to present witnesses on its behalf. LCC § 3-14-8(B)(1) (Br. App. 29a). If the applicant is deemed ineligible for a license under the objective standards, the city manager shall issue an order, based on findings of fact, within two days after the hearing. LCC § 3-14-8(B)(2) (Br. App. 29a-30a). That order is immediately appealable to the state district court pursuant to Colo.R.Civ.P. 106(a)(4). LCC § 3-14-8(B)(3) (Br. App. 30a). Finally, if a city official fails to render a timely decision at any time in this process, the official "shall be deemed to have approved" the issuance of the requested license. LCC § 3-14-8(C) (Br. App. 30a).

Because the Littleton Ordinance plainly provides the ability to appeal a licensing decision in court as a matter of right, immediately upon the conclusion of administrative proceedings, the question is not whether judicial review should be *available*, but instead whether the courts are so singularly suited to making licensing determinations that the First Amendment compels deviating from a process that provides prompt commencement of "effective judicial review." *Thomas*, 534 U.S. at 323. Here, the City's objective standards and extensive administrative procedures minimize the risk of an erroneous determination that would prejudice an adult business. The objective standards not only obviate the need for strict judicial superintendence, they also support the City's view that

any error in the process would be obvious, and would be "remedied promptly by judicial intervention." *City of Colorado Springs*, 896 P.2d at 284.

Finally, the immediate availability of judicial review also rebuts the unsupported theory, espoused by the Tenth Circuit, that even though a licensing official "may have little or no discretion in reviewing an application," he may "be tempted nevertheless to overstep the bounds of the ordinance." (Pet. App. 31). Such speculation, which need not detain this Court, is clearly contrary to this Court's view that public officials are entitled to "a presumption of honesty and integrity" in the performance of their public duties in the absence of facts to the contrary. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *U.S. v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (noting that courts presume public officers have properly discharged their official duties). Such a presumption is all the more warranted here, where there is, in fact, no discretion in reviewing an application. (Pet. App. 29 n.13); *Thomas*, 534 U.S. at 325 ("[A]buse must be dealt with if and when a pattern of unlawful favoritism appears").

II. Accepting ZJ's Argument Would Cause Substantial, Unwarranted Harm to Municipal and Judicial Interests.

A myriad of logical and practical problems infect ZJ's view that the Constitution requires municipalities to guarantee a judge's prompt decision. Unlike the censorship situation in *Freedman*, where the requirement did not impede the public interest or orderly functioning of the judiciary, expanding the *Freedman* line of cases to this inapposite context would eviscerate the ability of local governments to control secondary effects through objective

licensing procedures and would clog the courts with municipal matters.

Initially the City notes that "a municipality has no authority to control the period of time in which a state court will adjudicate a matter." *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 893-894 (6th Cir. 2000). The same is true of state legislatures, which are bound by separation of powers provisions in state constitutions from interfering with the independence of the judiciary in this regard. *See, e.g., Coate v. Omholt*, 662 P.2d 591, 203 Mont. 488 (1983) (holding that legislative imposition of deadlines for judicial decision making violated separation of powers doctrine); *Allen v. Butterworth*, 756 So.2d 52 (Fla. 2000) (holding that state legislature may not impose deadlines for deciding habeas corpus motions without violating separation of powers).

Colorado is no different. Article III of the Colorado Constitution establishes three co-equal departments of government and states that no department "shall exercise any power properly belonging to either of the others." In *Interest of J.E.S.*, the Colorado Supreme Court specifically held that "the courts must be independent, unfettered, and free from directives, influence, or interference" from the legislature. 817 P.2d at 511.[17] Thus, by imposing an

[17] Although ignored by the Tenth Circuit in this case, the inability of cities to control judicial dockets has not been lost on all of the lower courts. *Mai Lee Le v. City of Citrus Heights*, 1999 U.S. Dist. Lexis 13477, *23 (E.D. Cal. 1999) (unpublished) ("In sum, *Freedman* and *Baby Tam* [*and Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998)] insist on a procedural safeguard that neither the City nor the State of California may have the power to provide. Nonetheless, those decisions—*however impractical they may be*—are the law") (emphasis supplied).

impossible requirement, the Tenth Circuit's decision has effectively invalidated dozens of similar ordinances in cities across the State of Colorado. A preliminary review of 50 municipal codes conducted by the Colorado Municipal League reveals that more than 30 cities employ adult business licensing procedures similar to Littleton's. (Pet. App. 136). Requiring a prompt judicial decision also assumes that state judges will forsake their duties of office by refusing to render one when necessary. Judges in the courts of the State of Colorado have the same duty to apply the protections of the United States Constitution as federal judges. "[S]tate courts share with federal courts an equivalent responsibility for the enforcement of federal rights, a responsibility one must expect they will fulfill." *Schlesinger v. Councilman*, 420 U.S. 738, 756 (1975). It must be assumed that a judge hearing a Colo.R.Civ.P. 106 review will recognize an obligation to proceed promptly and exercise the power to grant a stay, to expedite the determination, or provide such other temporary relief as may be appropriate.

Another curious result of imposing a prompt judicial decision requirement in adult business licensing cases would be that it would have the effect of giving the core political speech activities discussed in *Thomas* less constitutional protection than sexually oriented businesses are afforded. Beginning with the decision in *Young*, this Court has determined that "material that is on the borderline between pornography and artistic expression," is of a less vital interest than "the free dissemination of ideas of social and political significance." *Young*, 427 U.S. at 61. As Justice Stevens noted:

> Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every school child can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizens' right to see 'specified sexual activities' exhibited in the theaters of our choice.

Id. at 70; *see also City of Erie*, 529 U.S. at 294.

Political speech requires the most vigilant protection under the Constitution. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 187-88 (1999) (first amendment protection for core political speech "is at its zenith"); *see also Meyer v. Grant*, 486 U.S. 414, 419 (1988). On the other hand, as noted above, sexually oriented speech has traditionally enjoyed protection on the periphery of the First Amendment. *Young*, 427 U.S. at 70-71; *cf. FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978). Yet read together, *Thomas* and the decisions of the circuits which require a prompt judicial decision would have the effect of requiring a prompt judicial decision for sexually oriented businesses, but not for core political speech.

Nevertheless, ZJ's expansive view would have the Constitution granting an unqualified adult business a *per se* right to operate until a court says otherwise.[18] This radical expansion of *Freedman* to content-neutral licensing determinations is not only unworkable and unwarranted under this Court's precedents, it would also create impediments and dangers for local governments in their efforts to control secondary effects through objective

[18] In this case, for example, requiring Littleton to provide a temporary license would allow felons recently convicted of sexual crimes or applicants under the age of eighteen to open and operate an adult business until a court ruled upon the City's denial of a license.

licensing procedures. This Court has repeatedly held that cities' substantial, content-neutral interest in preventing secondary effects—like those identified by the City in this case, Pet. App. 60—is "undeniably important." *City of Erie*, 529 U.S. at 296-297 (following *Young*, *Renton*, and *California v. LaRue*, 409 U.S. 109 (1972)); *see also City of Los Angeles*, 535 U.S. at 444 (Kennedy, J., concurring in the judgment) ("Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood. The damage is measurable; it is all too real").

If *Freedman's* prompt judicial decision requirement is extended to the situation at bar, the expansion of that rule in the lower courts is practically unavoidable. Indeed, lower courts adopting this requirement have implemented "the *policy* underlying this [prompt judicial decision] safeguard" by extending *Freedman* to post-licensing sanctions based on violative conduct. *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999) (emphasis supplied); *see also Nightclubs, Inc.*, 202 F.3d at 894 (holding that in licensing, "a city may very well have to go beyond merely maintaining the status quo"); *City News and Novelty*, 531 U.S. at 282 (noting that petitioner adult bookstore's actual request was for a stay after the city refused to renew a license based on, *inter alia*, allowing patrons to engage in sexual activity on the premises). Yet neither logic nor precedent requires municipalities to abdicate their police power when implementing objective licensing standards, either initially or upon periodic review.

ZJ's also fails to acknowledge the sea change its theory would work in municipal law and the role of the courts. The requirement of a prompt judicial decision would necessarily undermine a wide range of time, place,

and manner regulations that are enforced through objective permitting procedures. These range from regulations of noncommercial expressive conduct in subways, *see Jews for Jesus*, 984 F.2d at 1327 (construing *FW/PBS* to require only that ordinance permit prompt judicial review), to permitting requirements for newsracks. *Graff*, 9 F.3d at 1324 n.11 (holding that ordinance did not confer unbridled discretion and ruling that a "newsstand is also as much a business as an adult bookstore. Therefore, Chicago need not prove its case in court before ruling on a permit or removing a newsstand").[19] Such a rule would unnecessarily thwart municipal attempts to control not only the secondary effects of adult businesses, but also the attendant consequences of a myriad of unregulated activities associated with expression. It would be unreasonable to hold that regulation to prevent negative secondary effects is a laudable goal, perhaps even a duty for municipalities, while at the same time creating a requirement which cities like Littleton simply cannot meet. The First Amendment does not compel such a result, nor does it require that municipalities grope for solutions which may not work, while allowing the conditions conducive to secondary effects to flourish during judicial review of ministerial licensing decisions.

---

[19] Note the similar concerns raised by the Colorado Municipal League in its Amicus Brief filed in support of Littleton's petition for rehearing en banc. (Pet. App. 138-139).

CONCLUSION

For these reasons, Littleton requests that this Court reverse the holding of the United States Court of Appeals for the Tenth Circuit requiring a prompt judicial decision and find that the requirement of prompt judicial review imposed by *FW/PBS* entails a prompt commencement of judicial proceedings.

Respectfully submitted,

J. ANDREW NATHAN
Counsel of Record
HEIDI J. HUGDAHL
NATHAN, BREMER, DUMM
& MYERS P.C.
3900 E. Mexico,
Suite 1000
Denver, CO 80210
(303) 691-3737

SCOTT D. BERGTHOLD
LAW OFFICE OF
SCOTT D. BERGTHOLD, P.L.L.C.
6830 McCutcheon Rd.
Chattanooga, TN 37421
(423) 899-3025

LARRY W. BERKOWITZ
City Attorney
BRAD D. BAILEY
Assistant City Attorney
City of Littleton, Colorado
2255 West Berry Avenue
Littleton, CO 80165
(303) 795-3725

CERTIFICATION

I, Julie K. Bower City Clerk for the City of Littleton, Colorado, do hereby certify that the attached is a true and complete copy of Ordinance No. 17, Series of 2003, as remains on file in the office of the City Clerk.

Dated this 31st day of October, 2003.

[SEAL]

/s/ Julie K. Bower
Julie K. Bower
City Clerk

CITY OF LITTLETON, COLORADO

ORDINANCE NO. 17

Series of 2003

INTRODUCED BY COUNCILMEMBERS: Cronenberger and Ostermiller

AN ORDINANCE OF THE CITY OF LITTLETON, COLORADO AMENDING SECTIONS 3-14-5 AND 3-14-7 OF THE LITTLETON CITY CODE PERTAINING TO THE LICENSING OF ADULT BUSINESSES

WHEREAS, the United States Court of Appeals for the Tenth Circuit found that certain provisions of the Adult Entertainment Business Code were unconstitutional in *ZJ Gifts D4 LLC v. City of Littleton,* 311 F. 3d 1220 (10th Cir. 2002); and

WHEREAS, the City Council desires to regulate adult entertainment businesses in a manner which is consistent with the Constitution of the United States.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLETON, COLORADO, THAT:

Section 1: Section 3-14-5(A) of the Littleton City Code is hereby amended by the addition of the words in all capital letters to read as follows:

(A) All applicants for an adult business license shall file an application for such license with the city clerk on forms to be provided by the clerk. Each principal owner and all managers and employees shall be named in the application form. AT THE TIME OF FILING AN APPLICATION, each manager, general, partner, and in the case of a corporate applicant, the president of the corporation, shall be photographed and fingerprinted by the city's police department. THE POLICE DEPARTMENT SHALL TAKE THE PHOTOGRAPHS AND FINGERPRINTS WITHIN FIVE (5) BUSINESS DAYS OF AN APPLICATION BEING FILED.

Section 2: Section 3-14-5(b)(10) is hereby repealed.

Section 3: Section 3-14-7 is hereby amended by the addition of the words in all capital letters and the deletion of the words stricken to read as follows:

3-14-7: INVESTIGATION:

On receipt of a properly completed application, ~~together with all information required in connection therewith, fingerprints and photographs~~, and the payment of the application and license fees, the city clerk shall transmit the application to the city's police department for an investigation of the background of each individual applicant, employee, the partners of a partnership, or the officers, directors and holders of the stock of a corporation.

Each applicant shall pay a nonrefundable investigation fee at the time the application is filed in the amount then charged by the Colorado department of public safety for each person who will be investigated. The investigation conducted by the police department shall be sufficient to verify the accuracy of all the information required by section 3-14-5 of this chapter. THE CLERK SHALL ALSO TRANSMIT A REQUEST TO THE CITY'S ZONING OFFICIAL FOR A REPORT THAT THE PROPOSED LOCATION OF SUCH ADULT BUSINESS COMPLIES WITH THE LOCATIONAL REQUIREMENTS OF THIS CHAPTER. THE ZONING OFFICIAL SHALL ISSUE SUCH REPORT WITHIN FIVE (5) BUSINESS DAYS OF TRANSMISSION OF THE REQUEST. IF THE ZONING OFFICIAL FAILS TO ISSUE THE REPORT AS REQUIRED, THE CITY CLERK MAY PRESUME THAT THE PROPOSED LOCATION OF THE ADULT BUSINESS COMPLIES WITH THIS CHAPTER.

Section 4: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of this ordinance. The City Council hereby declares that it would have passed this ordinance, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

Section 5: Repealer. All ordinances or resolutions, or parts thereof, in conflict with this ordinance are hereby repealed, provided that this repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

INTRODUCED AS A BILL at a regularly scheduled meeting of the City Council of the City of Littleton on the 20th day of May, 2003, passed on first reading by a vote of 7 FOR and 0 AGAINST; and ordered published in full in the Littleton Independent of May 22, 2003.

PUBLIC HEARING on the Ordinance to take place on the 3rd day of June, 2003, in the Council Chambers, Littleton Center, 2255 West Berry Avenue, Littleton, Colorado; at the hour of 7:00 p.m., or as soon thereafter as it may be heard.

PASSED on second and final reading, following public hearing, by a vote of 6 FOR and 0 AGAINST on the 3rd day of June, 2003, and ordered published by reference only in the Littleton Independent on the 5th day of June, 2003.

ATTEST:

/s/ Julie K. Bower
CITY CLERK

/s/ Susan M. Thornton
PRESIDENT OF
CITY COUNCIL

APPROVED AS TO FORM:

/s/ Brad D. Bailey
CITY ATTORNEY

CITY OF LITTLETON, COLORADO

ORDINANCE NO. 37

Series of 2003

INTRODUCED BY COUNCILMEMBERS: Taylor and Meagher

AN ORDINANCE OF THE CITY OF LITTLETON, COLORADO AMENDING SECTIONS 3-14-7 AND 3-14-8 OF THE LITTLETON CITY CODE PERTAINING TO THE LICENSING OF ADULT BUSINESSES

WHEREAS, a periodic review of the City's Adult Business Licensing provisions has revealed that clarifications are appropriate to avoid any assertion or perception of inconsistencies in the Ordinance; and

WHEREAS, a periodic review of the City's Adult Business Licensing provisions has revealed that the licensing process can be revised to allow for more prompt administrative decisions in licensing adult businesses; and

WHEREAS, the City Council intends, as it has done, to periodically review the City's Adult Business Licensing provisions to make sure that they remain consistent and in accordance with court decisions.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLETON, COLORADO, THAT:

Section 1: The definition of specified criminal acts as contained in Section 3-14-2 of the Littleton City Code is hereby amended to read:

SPECIFIED CRIMINAL ACTS:

Sexual crimes against children, sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, or pandering.

Section 2: Section 3-14-5(A) of the Littleton City Code is hereby amended to read:

(A) All applicants for an adult business license shall file an application for such license with the City Clerk on forms to be provided by the Clerk. Each principal owner and all managers and employees shall be named in the application form.

Section 3: Section 3-14-5(B) of the Littleton City Code is hereby amended by the addition of a new Section 11:

11. Photographs [passport size or approximately two inches (2") by two inches (2")] and fingerprints of all principal owners and each manager, general partner and in the case of a corporate applicant, the president of the corporation.

Section 4: Subsection 3-14-5(B)(1)(a) of the Littleton City is hereby amended to read:

An individual, the individual shall state his or her legal name and any aliases and shall submit satisfactory proof that he or she is eighteen (18) years of age;

Section 5: Subsection 3-14-5(B)(7) of the Littleton City Code is hereby amended to read:

7. A photocopy of the driver's license or other government-issued identification card for the individuals listed in subsection (A) of this Section.

Section 6: Subsection 3-14-5(D) of the Littleton City Code is hereby amended to read:

D. If an omission or error is discovered by the City Clerk the application will be returned to the applicant for completion or correction without further action by the City Clerk. Any application rejected to an omission or error shall be refiled only when the omission or error has been remedied. For the purposes of this chapter, the date the City Clerk accepts an application which is complete shall be the date the application is filed with the City Clerk.

Section 7: Section 3-14-7 of the Littleton City Code is hereby amended to read:

3-14-7: INVESTIGATION:

On receipt of a properly completed application and the payment of the application and license fees, the City Clerk shall investigate the background of each individual applicant, employee, the partners of a partnership, or the officers, directors and holders of the stock of a corporation. Each applicant shall pay a nonrefundable investigation fee at the time the application is filed in the amount then charged by the Colorado department of public safety for each person who will be investigated. The investigation conducted by the Clerk shall be sufficient to verify the accuracy of all the information required by section 3-14-5 of this chapter. The Clerk shall also transmit a request to the city's zoning official for a report that the proposed location of such adult business complies with the locational requirements of this chapter. The zoning official shall issue such report within five (5) business days of transmission of the request. If the zoning official fails to issue the report as required, the City Clerk shall presume that the proposed location of the adult business complies with this chapter.

Section 8: Section 3-14-8 of the Littleton City Code is hereby amended to read:

3-14-8: **APPROVAL/DENIAL OF LICENSE:**

(A) The application of any applicant shall be approved or denied by the City Clerk within fourteen (14) days of the date the application is filed with the City Clerk. The City Clerk shall deny a license if:

1. The applicant is under the age of eighteen (18) years;

2. The applicant has made a false statement upon the application or has given false information in connection with an application;

3. The applicant or any holder of any class of stock, or a director, officer, partner or principal of the applicant has had an adult business license revoked or suspended anywhere within the state within one year prior to the application;

4. The applicant has operated an adult business which has determined to be a public nuisance under state law or this code within one year prior to the application;

5. A corporate applicant is not in good standing or authorized to do business in the state; or

6. The applicant is overdue in the payment to the City of taxes, fees, fines or penalties assessed against him/her or imposed against him/her in relation to an adult business;

7. The applicant has not obtained the required sales tax license;

8. The applicant has been convicted of a specified criminal act within the five year period prior to the date the application is filed with the City Clerk.

(B) In the event that the City Clerk denies a license, he/she shall make written findings of fact stating the reasons for the denial, and a copy of such decision shall be sent by first class mail to the address shown in the application. An applicant shall have the right to a hearing before the City Manager as set forth in subsection 3-14-11(C) of this chapter. A written request for such hearing shall be made to the City Manager within ten (10) days of the date of the denial of the license by the City Clerk. This hearing shall be held within fourteen (14) days from the date a timely request for hearing is received by the City Manager and shall follow all the relevant procedures set forth for a suspension or revocation of a license contained in subsection 3-14-11(C) of this chapter.

1. At the hearing referred to above, the City Manager shall hear such statements and consider such evidence as the police department or other enforcement officers, the applicant or other party in interest, or any other witness shall offer which is relevant to the denial of the license application by the City Clerk.

2. If the City Manager determines that the applicant is ineligible for a license per subsection (A) of this section, he/she shall issue an order sustaining the City Clerk's denial of the application, within two (2) days after the hearing is concluded, based on findings of fact. A copy of the order shall be mailed to the applicant at the address supplied on the application.

3. The order of the City Manager made pursuant to subsection (B)2 of this section shall be a final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure 106(a)(4).

Failure of an applicant to timely follow the limits specified above constitutes a waiver by him/her of any right he/she may otherwise have to contest the denial of his/her license application.

(C) If any city official or department fails to render a timely decision pursuant to the terms of this ordinance then said official or department shall be deemed to have approved or consented to the issuance of the requested license.

Section 9: Section 3-14-11(A)(8) of the Littleton City Code is hereby amended to read:

8. The manager or the employee of the licensed establishment is under the age of eighteen (18) years;

Section 10: Section 3-14-16 of the Littleton City Code is hereby amended to read:

Admission to adult businesses is restricted to persons of the age of eighteen (18) years or more.

Section 11: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of this ordinance. The City Council hereby declares that it would have passed this ordinance, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

Section 12: Repealer. All ordinances or resolutions, or parts thereof, in conflict with this ordinance are hereby repealed, provided that this repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

INTRODUCED AS A BILL at a regularly scheduled meeting of the City Council of the City of Littleton on the 4th day of November, 2003, passed on first reading by a vote of 7 FOR and 0 AGAINST; and ordered published in full in the Littleton Independent of November 6, 2003.

PUBLIC HEARING on the Ordinance to take place on the 18th day of November, 2003, in the Council Chambers, Littleton Center, 2255 West Berry Avenue, Littleton, Colorado, at the hour of 7:00 p.m., or as soon thereafter as it may be heard.

PASSED on second and final reading as amended, following public hearing, by a vote of 7 FOR and 0 AGAINST on the 18th day of November, 2003, and ordered published in full in the Littleton Independent on the 20th day of November, 2003.

ATTEST:

/s/ Nancy K. Worthington
Deputy CITY CLERK

/s/ John K. Ostermiller
PRESIDENT OF
CITY COUNCIL

APPROVED AS TO FORM:

/s/ Larry W. Berkowitz
CITY ATTORNEY

CHAPTER 14

ADULT ENTERTAINMENT ESTABLISHMENTS

3-14-1: PURPOSE:

1. The purpose and intent of this Chapter is to regulate adult businesses, to promote the health, safety, morals and general welfare of the citizens of the City, and to establish reasonable and uniform regulations to prevent the deleterious location and concentration of adult businesses within the City, thereby reducing or eliminating the adverse secondary effects from such adult businesses. The provisions of this Chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including adult materials. Similarly, it is not the intent nor effect of this Chapter to restrict or deny access by adults to adult materials protected by the First Amendment or the Colorado constitution, or to deny access by the distributors and exhibitors of adult entertainment to their intended market. Neither is it the intent nor effect of this Chapter to condone or legitimize the distribution of obscene material.

3-14-2: DEFINITIONS:

ADULT ARCADE: An establishment where, for any form of consideration, one or more still or motion picture projectors, slide projectors or similar machines, or other image producing machines, for viewing by five (5) or fewer persons each, are used to show films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or

description of "specified sexual activities" or "specified anatomical areas".

ADULT BOOKSTORE, ADULT NOVELTY STORE OR ADULT VIDEO STORE:

A commercial establishment which a) devotes a significant or substantial portion of its stock-in-trade or interior floor space to; b) receives a significant or substantial portion of its revenues from; or c) devotes a significant or substantial portion of its advertising expenditures to the promotion of: the sale, rental or viewing (for any form of consideration) of books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas". An establishment may have other principal business purposes that do not involve the offering for sale, rental or viewing of materials depicting or describing "specified sexual activities" or "specified anatomical areas", and still be categorized as an adult bookstore, adult novelty store or adult video store. Such other business purposes will not serve to exempt such establishment from being categorized as an adult bookstore, adult novelty

store or adult video store so long as the provisions hereof are otherwise met.

ADULT BUSINESS: An adult arcade, adult bookstore, adult novelty shop, adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, sexual encounter establishment or nude model studio. The definition of "adult businesses" shall not include an establishment where a medical practitioner, psychologist, psychiatrist or similar professional person licensed by the State engages in medically approved and recognized sexual therapy.

ADULT CABARET: A club, restaurant, "pop shop", or similar commercial establishment which features: a) persons who appear nude or in a state of nudity or semi-nude; b) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities", or c) films, motion pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas".

ADULT MOTEL: A motel, hotel or similar commercial establishment which: a) offers public accommodations for any form of consideration and provides patrons with closed-circuit television transmissions, films, motion

pictures, video cassettes, slides or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas" and which advertises the availability of this adult type of material by means of a sign visible from the public right of way, or by means of any off-premises advertising, including but not limited to newspapers, magazines, pamphlets or leaflets, radio or television, or b) offers a sleeping room for rent for a period of time less than ten (10) hours; or c) allows a tenant or occupant to subrent a sleeping room for a time period of less than ten (10) hours.

ADULT MOTION PICTURE THEATER: A commercial establishment where films, motion pictures, video cassettes, slides or similar photographic reproductions depicting or describing "specified sexual activities" or "specified anatomical areas" are regularly shown for any form of consideration.

ADULT THEATER: A theater, concert hall, auditorium or similar commercial establishment which, for any form or consideration, regularly features persons who appear in a state of nudity or live performances which are characterized by exposure of "specified

anatomical areas" or by "specified sexual activities".

EMPLOYEE: A person who works or performs in and/or for an adult business, regardless of whether or not said person is paid a salary, wage or other compensation by the operator of said business.

ESTABLISHMENT: In regard to an adult business, means and includes any of the following:

(A) The opening or commencement of any such business as a new business;

(B) The conversion of an existing business into an adult business;

(C) The addition of an adult business to any other existing adult business; or

(D) The relocation of an adult business.

LICENSING OFFICER: The City Clerk.

MANAGER: An operator, other than a licensee, who is employed by an adult business to act as a manager or supervisor of employees or is otherwise responsible for the operation of the business.

NUDE MODEL STUDIO:

Any place where a person, who appears in a state of nudity or displays "specified anatomical areas", is provided for money or any form of consideration to be observed, sketched, drawn, painted, sculpted, photographed or similarly depicted by other persons.

NUDITY OR STATE OF NUDITY:

(A) The appearance of human bare buttocks, anus, male genitals, female genitals or the areola or nipple of the female breast;

(B) A, state of dress which fails to opaquely and fully cover a human buttocks, anus, male or female genitals, pubic region or areola or nipple of the female breast.

OPERATOR: Includes the owner, permit holder, custodian, manager, operator or person in charge of any permitted or licensed premises.

PEEP BOOTH: A viewing room of less than one hundred fifty (150) square feet of floor space.

PERMITTEE AND/OR LICENSEE:

A person in whose name a permit and/or license to operate an adult business has been issued, as well as the individual listed as an applicant on the application for a permit and/or license.

PERSON: An individual, proprietorship, partnership, corporation, limited liability company, association or other legal entity.

PREMISES OR PERMITTED OR LICENSED PREMISES:

Any premises that requires a license and/or permit and that is classified as an adult business.

PRINCIPAL OWNER: Any person owning, directly or beneficially, a) ten percent (10%) or more of a corporation's equity securities; b) ten percent (10%) or more of the membership interests in a limited liability company; or c) in the case of any other legal entity, ten percent (10%) or more of the ownership interests in the entity.

PRIVATE ROOM: A room in an adult motel that is not a peep booth, has a bed and a bath in the room or adjacent room, and is used primarily for lodging.

SEMINUDE: A state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

SEXUAL ENCOUNTER ESTABLISHMENT:

A business or commercial establishment, that as one of its primary business purposes, offers, for

any form of consideration, a place where two (2) or more persons may congregate, associate, or consort for the purpose of "specified sexual activities" or the exposure of "specified anatomical areas" or activities when one or more of the persons is in a state of nudity or seminude. An adult motel will not be classified as a sexual encounter establishment by virtue of the fact that it offers private rooms for rent.

SPECIFIED ANATOMICAL AREAS:

(A) Less than completely and opaquely covered human genitals, pubic region, buttocks, anus or female breasts below a point immediately above the top of the areolae; or

(B) Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

SPECIFIED CRIMINAL ACTS:

Sexual crimes against children, sexual abuse, rape or crimes connected with another adult business, including distribution of obscenity, prostitution, or pandering.

SPECIFIED SEXUAL ACTIVITIES:

(A) The fondling or other intentional touching of human genitals,

pubic region, buttocks, anus or female breasts;

(B) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation or sodomy;

(C) Masturbation, actual or simulated; or

(D) Human genitals in a state of sexual stimulation, arousal or tumescence;

(E) Excretory functions as part of or in connection with any of the activities set forth in subsections (A) through (D) of this definition.

TRANSFER OF OWNERSHIP OR CONTROL OF AN ADULT BUSINESS: Means and includes any of the following:

(A) The sale, lease or sublease of the business;

(B) The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange or similar means;

(C) The establishment of a trust, management arrangement, gift or other similar legal devise which transfers ownership or control of the business, except for transfer by bequest or other operation of law upon the death of a person possessing the ownership or control.

3-14-3: LOCATION OF ADULT BUSINESSES; AMORTIZATION:

(A) shall be unlawful to operate or cause to be operated an adult business in any location in the city except as provided in this code.

(B) It shall be unlawful to operate or cause to be operated an adult business within five hundred feet (500') of:

1. A church;

2. A school or childcare facility;

3. A public park (not including trails);

4. A massage parlor licensed under provisions of the city code; or

5. A community correctional facility.

(C) It shall be unlawful to cause or permit the operation of an adult business within one thousand feet (1,000') of another adult business or a massage parlor as defined by section 12-48.5-103 Colorado Revised Statutes. The distance between any such businesses and those businesses specified in subsection (B) of this section shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which the adult business is located.

(D) It shall be unlawful to cause or permit the operation or maintenance of more than one adult business in the same building, structure or portion thereof.

(E) Any adult business lawfully operating on the effective date of this chapter that is in violation of subsections (B) through (D) of this section will be permitted to continue for a period six (6) months from the effective

date hereof. However, the zoning administrator may grant an extension of time during which an adult business in violation of subsections (B) through (D) of this section will be permitted to continue upon a showing that the owner of the business has not had a reasonable time to recover the initial financial investment in the business. No such extension of time shall be for a period greater than that reasonably necessary for the owner of the business to recover his/her initial financial investment in the business. An adult business in violation of subsections (B) through (D) of this section may continue during such extended period, unless the business is sooner terminated for any reason or voluntarily discontinued for a period of thirty (30) days or more. Such business shall not be enlarged, extended or altered except that the business may be brought into compliance with this chapter. If two (2) or more adult businesses are within one thousand feet (1,000') of one another and otherwise in a permissible location, the adult business which was first established and continually operating at the particular location will be deemed to be in compliance with subsections (B) through (D) of this section, and the later established business(es) will be deemed to be in violation of subsections (B) through (D) of this section.

(F) An, adult business lawfully operating is not rendered a nonconforming use by the subsequent location of a church, school, childcare facility, public park, residential district, or a residential lot within five hundred feet (500') of the adult business; however, if the adult business ceases operation for a period of one hundred eighty (180) days or more regardless of any intent to resume operation, it may not recommence operation in that location.

3-14-4: LICENSE REQUIRED; FEE:

(A) No person shall conduct an adult business without first having obtained an annual adult business license.

(B) Applicants for an annual adult business license shall pay a license fee of five hundred dollars ($500.00).

(C) In the event an application for an adult business license is withdrawn or denied, the license fee shall not be refunded to the applicant.

3-14-5: LICENSE APPLICATION:

(A) All applicants for an adult business license shall file an application for such license with the city clerk on forms to be provided by the clerk. Each principal owner and all managers and employees shall be named in the application form.

(B) The completed application shall contain the following information and shall be accompanied by the following documents:

1. If the applicant is:

(a) An individual, the individual shall state his/her legal name and any aliases and submit satisfactory proof that he or she is eighteen (18) years of age;

(b) A partnership, the partnership shall state its complete name, and the names of all partners, whether the partnership is general or limited, and a copy of the partnership agreement, if any;

(c) A corporation, the corporation shall state its complete name, the date of its incorporation, evidence that the corporation is in good standing under

the statutes of the state, or in the case of a foreign corporation, evidence that it is currently authorized to do business in the state, the names and capacity of all officers, directors and principal owners, and the name of the registered corporate agent and the address of the registered office for service of process;

(d) A limited liability company shall state its complete name, the date of filing of the articles of organization and operating agreement, the names of all managers and members.

2. Whether the applicant or any other individual listed under subsection (A) of this section had worked under or has had a previous adult business license under this chapter or other adult business or adult entertainment ordinance from another state, city or county denied, suspended or revoked, including the name and location of the adult business for which the permit was denied, suspended or revoked, as well as the date of the denial, suspension or revocation.

3. Whether the applicant or any other individual listed under subsection (A) of this section holds any other licenses under this chapter or other similar adult business ordinance from another city, county or state and, if so, the names and locations of such other permitted business.

4. The location of the proposed adult business, including a legal description of the property, street address and telephone number(s), if any.

5. Proof of the applicant's right to possession of the premises wherein the adult business is proposed to be conducted.

6. The applicant's, or any other individual's listed, pursuant to subsection (A) of this section, mailing address and residential address.

7. A photocopy of the driver's license or other government-issued identification card of the individuals listed in subsection (A) of this section.

8. A floor plan of the proposed licensed premises which specifies the location and dimensions of any manager's station and demonstrates that there is an unobstructed view from at least one of the manager's stations of every area of the premises to which any patron is permitted access for any purpose, excluding restrooms. The proposed floor plan shall designate those rooms or other areas of the premises where patrons are not permitted and shall also designate the use of each room or other area of the premises. The proposed floor plan need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches (6"). The diagram shall designate the place where the license will be conspicuously posted and the location of any proposed stage. A floor plan is not required of the licensed premises of an adult motion picture theater.

9. A current certificate drawing prepared, within thirty (30) days prior to the application, by a land surveyor depicting the property lines and the structures containing any adult business or massage parlor within one thousand feet (1,000') of the closest exterior wall of the structure in which the applicant's business is proposed to be located and depicting the property line of any church, school, childcare facility, public park, residential zone district or residential lot within five hundred feet (500') from the closest exterior wall of the structure in which the applicant's business is proposed to be located.

10. Whether the applicant or any of the other individuals listed pursuant to subsection (A) of this section have been convicted of a specified criminal act within the times set forth in section *3-14-8* of this chapter and, if so, the specified criminal act involved, the date of conviction and the place of conviction.

11. Photographs [passport size or two inches (2") by two inches (2")] and fingerprints of all principal owners and each manager, general partner and in the case of a corporate applicant, the president of the corporation.

(C) If the applicant is an individual, he/she must sign the application for a license. If the applicant is a corporation it must be signed by the president or vice president and attested to by the secretary or assistant secretary. If the applicant is a general or limited partnership it must be signed by a general partner. If the applicant is a limited liability company it must be signed by the manager.

(D) If an omission or error is discovered by the city clerk, the application will be returned to the applicant for completion or correction without further action by the city clerk. Any application rejected due to an omission or error shall be refiled only when the omission or error has been remedied. For the purposes of this chapter, the date the city clerk accepts an application which is complete shall be the date the application is filed with the city clerk.

(E) In the event that the city clerk determines that the applicant has improperly completed the application, he/she shall promptly notify the applicant of such fact and allow the applicant thirty (30) days to properly complete the application. The time period for granting or denying a license shall be stayed during

the period in which the applicant is allowed an opportunity to properly complete the application.

(F) Applicants for a license under this chapter shall have a continuing duty to promptly supplement application information required by this section in the event that said information changes in any way from what is stated on the application. The failure to comply with said continuing duty within thirty (30) days from the date of such change, by supplementing the application on file with the city clerk, shall be grounds for the suspension or revocation of an adult business license.

3-14-6: APPLICATION FEE:

1. Each applicant for a new license or as specified in subsection *3-14-12(B)* of this chapter, whether an individual, partnership or corporation, shall pay an application fee of one hundred fifty dollars ($150.00) at the time of the filing of an application. Such application fee shall be nonrefundable.

3-14-7: INVESTIGATION:

1. On receipt of a properly completed application and the payment of the application and license fees, the city clerk shall investigate the background of each individual applicant, employee, the partners of a partnership, or the officers, directors and holders of the stock of a corporation. Each applicant shall pay a nonrefundable investigation fee at the time the application is filed in the amount then charged by the Colorado department of public safety for each person who will be investigated. The investigation conducted by the clerk shall be sufficient to verify the accuracy of all the information required by section *3-14-5* of this chapter. The clerk shall also transmit a request to

the city's zoning official for a report that the proposed location of such adult business complies with the locational requirements of this chapter. The zoning official shall issue such report within five (5) business days of transmission of the request. If the zoning official fails to issue the report as required, the city clerk shall presume that the proposed location of the adult business complies with this chapter.

3-14-8: APPROVAL/DENIAL OF LICENSE:

(A) The application of any applicant shall be approved or denied by the city clerk within fourteen (14) days of the date the application is filed with the city clerk. The city clerk shall deny a license if:

1. The applicant is under the age of eighteen (18) years;

2. The applicant has made a false statement upon the application or has given false information in connection with an application;

3. The applicant or any holder of any class of stock, or a director, officer, partner or principal of the applicant has had an adult business license revoked or suspended anywhere within the state within one year prior to the application;

4. The applicant has operated an adult business which has determined to be a public nuisance under state law or this code within one year prior to the application;

5. A corporate applicant is not in good standing or authorized to do business in the state; or

6. The applicant is overdue in the payment to the city of taxes, fees, fines or penalties assessed against

him/her or imposed against him/her in relation to an adult business;

7. The applicant has not obtained the required sales tax license;

8. The applicant has been convicted of a specified criminal act within the five year period prior to the date the application is filed with the City Clerk.

(B) In the event that the city clerk denies a license, he/she shall make written findings of fact stating the reasons for the denial, and a copy of such decision shall be sent by first class mail to the address shown in the application. An applicant shall have the right to a hearing before the city manager as set forth in subsection *3-14-11(C)* of this chapter. A written request for such hearing shall be made to the city manager within ten (10) days of the date of the denial of the license by the city clerk. This hearing shall be held within fourteen (14) days from the date a timely request for hearing is received by the city manager and shall follow all the relevant procedures set forth for a suspension or revocation of a license contained in subsection *3-14-11(C)* of this chapter.

1. At the hearing referred to above, the city manager shall hear such statements and consider such evidence as the police department or other enforcement officers, the applicant or other party in interest, or any other witness shall offer which is relevant to the denial of the license application by the city clerk. In such cases where specified criminal acts are in issue, the provisions of Colorado Revised Statutes section 24-5-101 shall control.

2. If the city manager determines that the applicant is ineligible for a license per subsection (A) of this

section, he/she shall issue an order sustaining the city clerk's denial of the application, within two (2) days after the hearing is concluded, based on findings of fact. A copy of the order shall be mailed to or be served on the applicant at the address on the application.

3. The order of the city manager made pursuant to subsection (B)2 of this section shall be a final decision and may be appealed to the district court pursuant to Colorado rules of civil procedure 106(a)(4). Failure of an applicant to timely follow the limits specified above constitutes a waiver by him/her of any right he/she may otherwise have to contest the denial of his/her license application.

(C) If any city official or department fails to render a timely decision pursuant to the terms of this ordinance then said official or department shall be deemed to have approved or consented to the issuance of the requested license.

3-14-9: TERM OF LICENSE:

1. All licenses granted pursuant to this chapter shall be for a term of one year. Said term shall commence on January 1 of each year and terminate upon December 31 of the same year. Applications for a license filed at any other time during the year shall be treated the same as if they were filed January 1 of that year and shall terminate on December 31 of that same year, and no proration shall be permitted.

3-14-10: LICENSE RENEWAL:

1. Renewal of an existing license granted pursuant to this chapter may be had by payment of the annual licensing fee and filing of a renewal application with the city clerk not less than forty five (45) days prior to the date of

expiration. The city clerk may waive, for good cause shown, this filing time requirement.

3-14-11: SUSPENSION OR REVOCATION OF LICENSE:

(A) The City Manager may suspend a license for a period not to exceed six (6) months or revoke any license granted pursuant to this Chapter upon a finding of any of the following facts:

1. That repeated disturbances of the public peace have occurred within the licensed establishment or upon any parking areas, sidewalks, accessways or grounds within the neighborhood of the licensed establishment involving patrons, employees or the licensee;

2. That the licensee or any employees thereof have offered for sale or knowingly allowed to be consumed or possessed upon the licensed premises, or upon any parking areas, sidewalks, walkways, accessways or grounds immediately adjacent to the licensed premises, narcotics, dangerous drugs or fermented malt, malt, vinous or spirituous beverages;

3. That the licensee or manager is not upon the licensed premises at all times that adult entertainment is being provided;

4. That adult entertainment was offered at the licensed establishment during hours prohibited by Section *3-14-14* of this Chapter;

5. That the licensee, manager or employee has allowed or has done nothing to prevent patrons from engaging in public displays of indecency in violation of State law or Sections *6-4-7* or *6-4-25* of this Code or has allowed patrons or employees to engage in acts of prostitution or negotiations for acts of prostitution

within the licensed establishment or upon any parking areas, sidewalks, access ways or grounds immediately adjacent to the licensed establishment, when the licensee, manager or employee knew or should have known such displays or acts were taking place;

6. That the licensee or manager made a false statement or gave false information in connection with an application for a license or a renewal of a license;

7. That the licensee, manager, or employee violated or permitted a violation of any provisions of this Chapter including the standards of conduct set forth in Section *3-14-15* of this Chapter;

8. That a manager or employee of the licensed establishment is under the age of eighteen (18) years;

9. That the licensee, in the case of a corporation, is not in good standing or authorized to do business in the State;

10. That the licensee or an employee knowingly operated any aspect or facilities of the adult business during a period of time when the adult business license was suspended;

11. That the licensee is delinquent in the payment to the City or State for any taxes or fees past due;

12. That the licensee, manager or employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation or masturbation, to occur within the licensed premises; or

13. That the licensee, manager or employee has been convicted of a specified criminal act.

(B) Nothing in this Chapter shall prohibit the City from taking any other enforcement action provided for by

this Code, the laws of the State, or of the United States.

(C) A licensee shall be entitled to a hearing before the City Manager if the City seeks to suspend or revoke his/her license based on a violation of this Chapter;

1. When there is probable cause to believe that a licensee has violated or permitted a violation of this Chapter to occur in or near the licensed establishment, the Police Department may file a written complaint with City Manager setting forth the circumstances of the violation.

2. City Manager shall provide a copy of the complaint to the licensee, together with notice to appear before the City Manager for the purpose of a hearing on a specified date to show cause why the licensee's license should not be suspended or revoked.

3. In such cases where specified criminal acts are in issue, the provisions of Colorado Revised Statutes section 24-5-101 shall control.

4. At the hearing referred to above, the City Manager shall hear such statements and consider such evidence as the Police Department, or other enforcement officers, the owner, occupant, lessee or other party in interest, or any other witness shall offer which is relevant to the violation alleged in the complaint. The City Manager shall make findings of fact from the statements and evidence offered as to whether the violation occurred in or near the licensed establishment. If the City Manager determines that a violation did occur he/she shall issue an order suspending or revoking the license, within twenty (20) days after the hearing is concluded, based on the findings of fact. A copy of the order shall be mailed to or served on the licensee at the address on the license.

5. The order of the City Manager made pursuant to subsection (C)3 of this Section shall be a final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure 106(a)(4). Failure of a licensee to timely appeal said order constitutes a waiver by him/her of any right he/she may otherwise have to contest the suspension or revocation of his/her license.

6. The City Manager shall have the power to administer oaths, issue subpoenas and, when necessary, grant continuances. Subpoenas may be issued to require the presence of persons and production of papers, books and records necessary to the determination of any hearing which the City Manager conducts. It is unlawful for any person to fail to comply with any subpoena issued by the City Manager. A subpoena shall be served in the same manner as a subpoena issued by the District Court of the State. Upon failure of any witness to comply with such subpoena, the City Attorney shall:

(a) Petition any Judge of the Municipal Court of the City, setting forth that due notice has been given of the time and place of attendance of the witness and the service of the subpoena, that the Court, after hearing evidence in support of or contrary to the petition, enter its order compelling the witness to attend and testify or produce books, records or other evidence, under penalty of punishment for contempt in case of wilful failure to comply with such order of Court; or

(b) Petition the appropriate District Court setting forth that due notice has been given of the time and place of attendance of the witness and the service of the subpoena, that the Court, after hearing evidence in support of or contrary to the petition, enter its order as in other civil actions, compelling the witness

to attend and testify or produce books, records or other evidence, under penalty of punishment for contempt in case of wilful failure to comply with such order of Court.

(D) In the event of suspension, revocation, or cessation of business, no portion of the license fee, application fee or investigative fee shall be refunded.

(E) When the City Manager revokes a license, the revocation shall continue for one year, and the licensee shall not be issued an adult business license for one year from the date the revocation became effective.

3-14-12: DISPLAY; TRANSFERABILITY; CHANGE OF OWNERSHIP:

(A) Any adult business license issued pursuant to the terms of this Chapter shall be prominently displayed at all times upon the premises for which the license was issued in accordance with subsection 3-14-5(B)8 of this Chapter.

(B) Licenses issued under this Chapter shall not be transferable except as provided herein. Any transfer of ownership or control by a licensee holding an adult business license shall result in termination of the license unless such licensee within thirty (30) days prior to any such transfer files a written notice of such transfer accompanied by the application fee and an investigation fee as required by Sections *3-14-6* and *3-14-7* of this Chapter. Any such transfer shall be reported on forms provided by the City Clerk and shall require the names of all new principal owners and any information as required by Section *3-14-5* of this Chapter. Approval or denial by the City Clerk of such transfer shall be upon the same terms as provided for in this Chapter for the approval or denial of an adult business license.

(C) When a license has been issued to a husband and wife or to general or limited partners, the death of a spouse or partner shall not require the surviving spouse or partner to obtain a new license. All rights and privileges granted under the original license shall continue in full force and effect as to such survivors for the balance of the license.

(D) Each license issued under this Chapter is separate and distinct, and no person shall exercise any of the privileges granted under any license other than that which he holds. A separate license shall be issued for each specific adult business and each geographical location.

3-14-13: MANAGER; CHANGE OF MANAGER:

(A) A registered manager shall be on the premises of an adult business at all times that adult entertainment is being provided. It shall be unlawful for any person to work as a manager of an adult business without first registering with the City Clerk. The registration form shall require the applicant to provide his/her legal name and any aliases, home address, telephone number and satisfactory proof that he is twenty one (21) years of age.

(B) In the event a licensee changes the manager or any employees of an adult business, the licensee shall report such change and register the new manager or any employees on forms provided by the City Clerk within ten (10) days of such change. Any new employee or manager shall pay the investigation fee specified in Section *3-14-7* of this Chapter and shall be subject to approval or denial in accordance with the provisions of Section *3-14-8* of this Chapter.

3-14-14: HOURS OF OPERATION:

It shall be unlawful for a sexually oriented business to be open for business or for the licensee or any employee of a licensee to allow patrons upon the licensed premises from twelve o'clock (12:00) midnight until eight o'clock (8:00) A.M.

3-14-15: STANDARDS OF CONDUCT:

(A) The following standards of conduct must be adhered to by employees of any adult business which offers, conducts or maintains live adult entertainment:

1. Clothing: No employee or entertainer mingling with the patrons or serving food or beverages shall be unclothed or in such attire, costume or clothing so as to expose to view any specified anatomical area.

2. Touching, Caressing, Fondling: No employee or entertainer shall encourage or knowingly permit any person upon the premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person.

3. Simulation Of Specified Areas: No employee or entertainer shall wear or use any device or covering exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

4. Performance Standards:

(a) No employee or entertainer shall be unclothed or in such attire, costume or clothing so as to expose any portion of the specified anatomical area except upon a stage at least eighteen inches (18") above the immediate floor level and removed at least six feet (6') from the nearest patron or behind a solid, uninterrupted physical barrier which completely separates the entertainer from any

patrons. This barrier must be a minimum of one-fourth inch (¼") thick and have no openings between the entertainer and any patrons. The stage shall be fixed and immovable.

(b) No employee or entertainer shall perform while nude or seminude any obscene acts or obscene acts which simulate specified sexual activities.

5. Use Of Inanimate Objects: No employee or entertainer shall use artificial devices or inanimate objects to depict any of the prohibited activities described in this Section.

6. Menu: There shall be posted and conspicuously displayed in every area offering adult entertainment a list of food and beverage prices.

7. Alcohol And Liquor: No adult entertainment use shall be located within any premises which is licensed for the retail sale of three and two-tenths percent (3.2%) beer, malt, vinous or spirituous liquor, as such terms are defined in title 12, articles 46 and 47 Colorado Revised Statutes.

8. Consumption Of Alcohol: It shall be unlawful to permit the consumption of three and two-tenths percent (3.2%) beer or other alcoholic beverages within the same premises as an adult entertainment use.

9. Tips: Any tips for entertainers shall be placed by a patron into a tip box which is permanently affixed in the adult business and no tip may be handed directly to an entertainer. A licensee that desires to provide for such tips from its patrons shall establish one or more containers to receive tips. Any physical contact between a patron and an entertainer is strictly prohibited.

10. Tip Boxes: An adult business that provides tip boxes shall conspicuously display in the common area of the premises one or more signs in letters at least one inch (1") high to read as follows:

ADULT ENTERTAINMENT IS REGULATED BY THE CITY OF LITTLETON

Any tips are to be placed in tip box and not handed directly to the entertainer. Any physical contact between the patron and the entertainer is prohibited by law. Violators face maximum penalties of $1,000 and/or one year in jail.

11. Outside Visibility: No adult entertainment occurring on the premises shall be visible at any time from outside of the premises.

(B) Any licensee who offers, conducts, or maintains live adult entertainment or an adult arcade which exhibits in a peep booth, a film, videocassette or other video reproduction, shall comply with the following requirements in addition to those set forth in subsection (A) of this section:

1. It is the duty of the licensee of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

2. It is the duty of the licensee and manager of the premises to ensure that any doors to public areas on the premises remain unlocked during business hours.

3. The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose, excluding restrooms. Restrooms may not contain video reproduction equipment or other forms of adult entertainment. If the premises has two (2) or

more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose, excluding restrooms, from at least one of the manager's, stations. The view required in this subsection must be by direct line of sight from the manager's station. A manager's station may not exceed thirty two (32) square feet of floor area.

4. No alteration to the configuration or location of an adult business may be made without the prior written approval of the zoning official.

5. It shall be the duty of the licensee, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in subsection (B)3 of this section remains unobstructed by any doors, curtains, drapes, walls, merchandise, display racks or other materials at all times and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the license application filed pursuant to this chapter.

6. No peep booth may be occupied by more than one person at any one time.

7. Peep booths must be separated from other peep booths by a solid, uninterrupted physical divider which is a minimum of one-fourth inch (1/4") thick and serves to prevent physical contact between patrons.

3-14-16: AGE RESTRICTIONS:

Admission to adult businesses, is restricted to persons of the age of eighteen (18) years or more.

3-14-17: LIGHTING REQUIREMENTS:

(A) All off-street parking areas and premises entries of adult businesses shall be illuminated from dusk to closing hours of operation with a lighting system which provides an average maintained horizontal illumination of one foot-candle of light on all parking surfaces and/or walkways. This required lighting level is to help ensure the personal safety of patrons and employees and to reduce the incidence of vandalism and other criminal conduct.

(B) The premises of all adult businesses, except adult motion picture theaters, shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access to provide an illumination of not less than two (2) foot-candles of light as measured at the floor level.

(C) Adult motion picture theaters shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access to provide an illumination of not less than one foot-candle of light as measured at the floor level.

3-14-18: RIGHT OF ENTRY:

1. The application for an adult business license shall constitute consent of the licensee and his/her agents or employees to permit the city's police department or any other agent of the city to conduct routine inspections of any licensed adult business during the hours the establishment is conducting business.

3-14-19: EXEMPTIONS, GENERALLY:

1. It is an affirmative defense to prosecution under this chapter a person appearing in a state of nudity or semi-nude did so in a modeling class operated:

(A) By a proprietary school, licensed by the state; a college, junior college or university supported entirely or partly by taxation;

(B) By a private college or university which maintains and operates educational programs in which credits are transferable to a college, junior college or university supported entirely or partly by taxation; or

(C) In a structure:

1. Which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing;

2. Where, in order to participate in a class a student must enroll at least three (3) days in advance of the class; and

3. Where no more than one nude model is on the premises at any one time.

Colo.R.Civ.P. 106. FORMS OF WRITS ABOLISHED

(a) Habeas Corpus, Mandamus, Quo Warranto, Certiorari, Prohibition, Scire Facias and Other Remedial Writs in the District Court. Special forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished in the district court. Any relief provided hereunder shall not be available in the superior or county courts. In the following cases relief may be obtained in the district court by appropriate action under the practice prescribed in the Colorado Rules of Civil Procedure:

(1) Where any person not being committed or detained for any criminal or supposed criminal matter is illegally confined or restrained of his liberty;

(2) Where the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such lower judicial body, governmental body, corporation, board, officer, or person. The judgment shall include any damages sustained;

(3) When any person usurps, intrudes into, or unlawfully holds or exercises any office or franchise, the district attorney of the proper district may and, when directed by the governor so to do, shall bring an action against such person in the name of the people of the state, but if the district attorney declines so to do, it may be

brought upon the relation and complaint of any person. The Rule heretofore existing requiring leave of court to institute such proceedings is hereby abolished. When such an action is brought against a defendant alleged to have usurped, intruded into, or who allegedly unlawfully holds or exercises any public office, civil or military, or any franchise it shall be given precedence over other civil actions except similar actions previously commenced. The judgment may determine the rightful holder of the office or franchise;

(4) Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdictions or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

(II) Review pursuant to this subsection (4) shall be commenced by the filing of a complaint. An answer or other responsive pleading shall then be filed in accordance with the Colorado Rules of Civil Procedure.

(III) If the complaint is accompanied by a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate of authenticity. The date for filing the record shall be after the date upon which an answer to the complaint must be filed.

(IV) Within twenty days after the date of receipt of an order requiring certification of a record, a defendant may file with the clerk a statement designating portions of the record not set forth in the order which it desires to place before the Court. The cost of preparing the record shall be advanced by the plaintiff, except that the Court may, on objection by the plaintiff, order a defendant to advance payment for the costs of preparing such portion of the record designated by the defendant as the Court shall determine is unessential to a complete understanding of the controversy; and upon a failure to comply with such order, the portions for which the defendant has been ordered to advance payment shall be omitted from the record. Any party may move to correct the record at any time.

(V) The proceedings before or decision of the body or officer may be stayed, pursuant to Rule 65 of the Colorado Rules of Civil Procedure.

(VI) Where claims other than claims under this Rule are properly joined in the action, the Court shall determine the manner and timing of proceeding with respect to all claims.

(VII) A defendant required to certify a record shall give written notice to all parties, simultaneously with filing, of the date of filing the record with the clerk. The plaintiff shall file, and serve on all parties, an opening brief within forty days after the date on which the record was filed. If no record is requested by the plaintiff, the plaintiff shall file an opening brief within forty days after the defendant has served its answer upon the plaintiff. The defendant may file and serve an answer brief within thirty days after service of the plaintiff's brief, and the plaintiff may file and serve a reply brief to the defendant's answer brief within fifteen days after service of the answer brief.

(VIII) The Court may accelerate or continue any action which, in the discretion of the Court, requires acceleration or continuance.

(IX) In the event the Court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of this action, the Court may remand for the making of such findings of fact or conclusions of law.

(5) When judgment is recovered against one or more of several persons jointly indebted upon an obligation, and it is desired to proceed against the persons not originally served with the summons who did not appear in the action. Such persons may be cited to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons, and in his answer any such person may set up any defense either to the original obligation or which may have arisen subsequent to judgment, except a discharge from the original liability by the statute of limitations.

(b) Limitations as to Time. Where a statute provides for review of the acts of any governmental body or officer or judicial body by certiorari or other writ, or for a proceeding in quo warranto, relief therein provided may be had under this Rule. If no time within which review may be sought is provided by any statute, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than thirty days after the final decision of the body or officer. A timely complaint may be amended at any time with leave of the court, for good cause shown, to add, dismiss or substitute parties, and

such amendment shall relate back to the date of filing of the original complaint.

Amended eff. Jan. 1, 1986.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

13-51-105 Colo. Rev. Stat. (2003). Power and force of declaration

Courts of record within their respective jurisdictions have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.